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**INQUIRIES**  
**IN THE**  
**SCIENCE OF LAW**

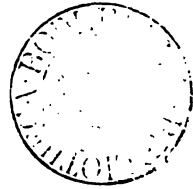


**INQUIRIES**  
**IN**  
**INTERNATIONAL LAW**  
**PUBLIC AND PRIVATE**

**BY**  
**JAMES REDDIE, ESQ.**

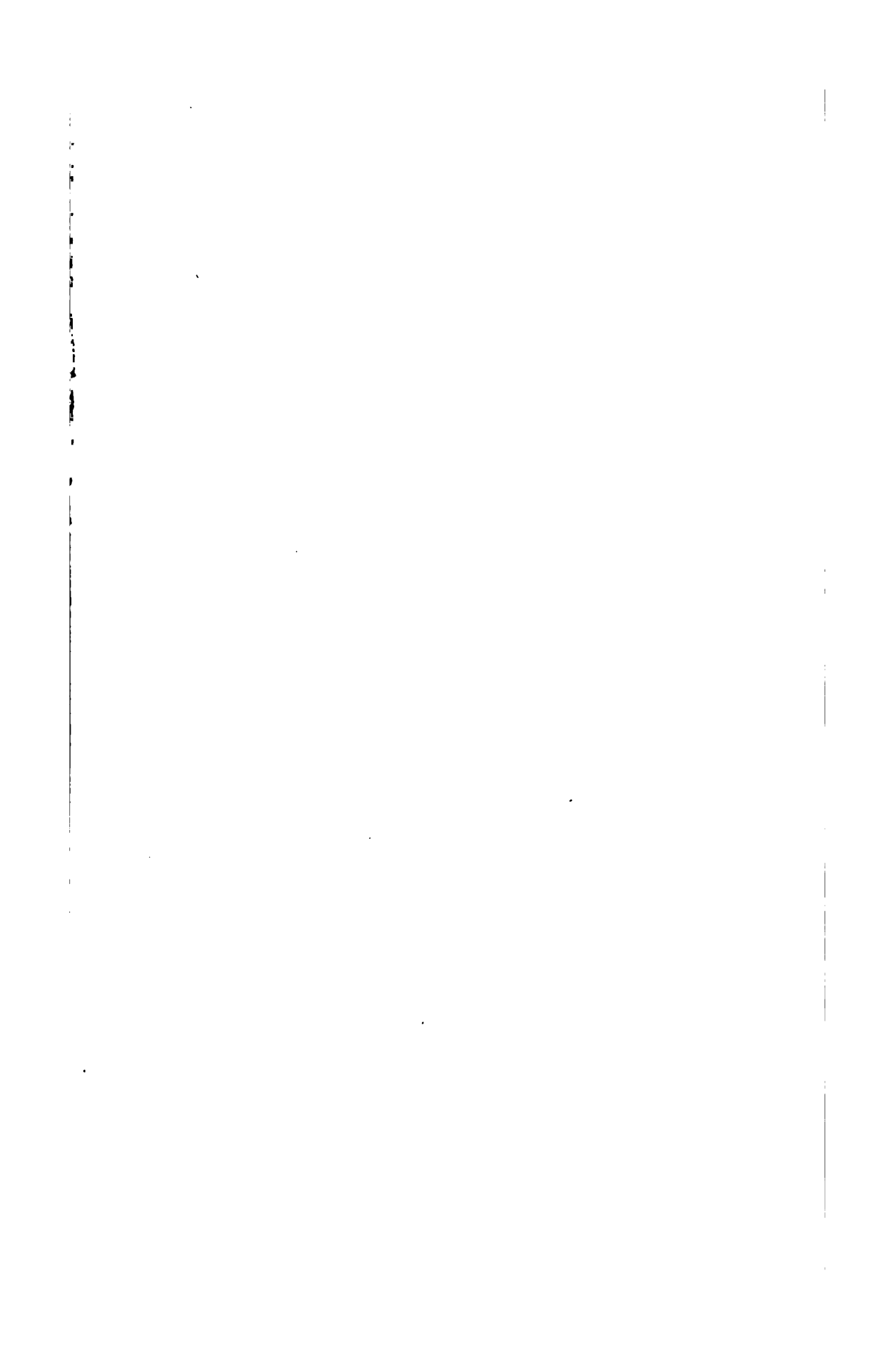
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AUTHOR OF "INQUIRIES IN THE SCIENCE OF LAW," OF "AN HISTORICAL VIEW  
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## PREFACE

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THE first edition of this work consisted chiefly of an historical introduction to the study of International Law, or exposition of the mode in which that department of law has been cultivated in modern times, and of some suggestions of improvement in the arrangement of that science.

In prosecuting the study of that department of the law, the author has, since the publication of the first edition, committed part of his observations to writing, which the able and learned editor of the *English Law Review* has inserted as successive articles in that scientific journal. But as these observations were not separate essays, but parts of one whole, it has been suggested that, when presented to the reader in one unbroken continuous form, their unity may be more distinctly perceived, and the force of the reasoning more easily and correctly judged of, than when split into separate successive

articles, appearing at intervals, as is unavoidable in a periodical publication ; and the chief object of this second edition is to add the several articles which have already appeared in the *Law Review* in the course of the years from 1846 to 1850.

GLASGOW, 12 BLYTHESWOOD SQUARE,  
August 1851.

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## INQUIRIES

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## INTERNATIONAL LAW.

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HAVING, in our previous *Inquiries*, marked the grand primary Division of Law, into the Internal law of States and International Law, and noticed the subordinate divisions of the former; reserving for future investigation the subdivisions and the more particular doctrines of Right and Obligation, which constitute the component parts of the internal private law of a nation, as enforced by its judicial tribunals, or Jurisprudence; reserving also for future investigation, the not less important doctrines, general and particular, which form the Internal Public or Constitutional Law of States; we now direct our inquiries to the other branch of the grand primary division just alluded to, namely, International Law. And notwithstanding the translations into English of Grotius, Bynkershoek, and Vattel; notwithstanding, also, the excellent historical and philosophical works of Mr Robert Ward, and the practical treatise of Mr Chitty, founded chiefly on the judgments of Sir William Scott, (Lord Stowell,) a systematic and scientifically arranged treatise on International Law, compiled not only from the works of Grotius, Wolff, and

Vattel, but also from the more recent valuable treatises of Von Martens, Lampredi, Rayneval, Schmalz and Klüber, and from such international judicial determinations, as those of Lord Stowell, appears to be still a desideratum in the legal or juridical literature of Great Britain. Indeed, this is a compilation, which almost every student, of international law, in this country, who is desirous of proficiency in the science, has in a manner, to make for himself. But in the prosecution of our Inquiries, Elementary and Historical, in the Science of law, we do not aim at the compilation of any such digest. Our object, at present, is merely to trace historically, how International Law has been cultivated, as a science ; to mark its proper sphere, and its different kinds or descriptions, ascertaining how far such distinctions are founded in fact ; to investigate the sources, and growth, or accumulation and development of International Law ; to review historically the more recent classifications of its component parts ; and to suggest a less exceptionable general arrangement of these component parts.

## CHAPTER I.

OF INTERNATIONAL LAW GENERALLY ; WHEN, AND  
HOW, IT HAS BEEN CULTIVATED, AS A SCIENCE.

IN our previous inquiries in the science of law, we had occasion to mark the distinction, pointed out by Dr Adam Smith, between justice and the other virtues ; and endeavoured to trace the boundaries between morality, and legality, between ethics, and compulsory, or coercive law. In opposition to a few very recent authors, we saw reason to concur, in opinion, with the great majority of juridical writers, that the rules of ethics, or morality, are applicable, not only to individual men, but to nations, to men congregated into communities, and occupying, as such, certain portions of the surface of this earth. But while we thus held, that the duties of beneficence, and the internal feelings of good-will, generosity, and gratitude, are applicable to, and may be truly predicated of, men, acting in their corporate or political capacity as a nation, as well as the more negative duties of justice, we had occasion to observe, that a good deal of obscurity, and confusion, in thought, and expression, had arisen from juridical writers not marking at the outset, the distinction between these different duties,—from their proceeding at first, as if they intended to include, under the *jus naturæ et gentium*, the whole doctrines of



morality, as involving so many reciprocal rights, and obligations ; and from their being thereby reduced to the necessity, in the course of their discussions, of dividing rights into perfect, and imperfect, viz., rights, which may be enforced consistently with justice and general expediency, and rights, which cannot be so enforced, and which are consequently, no rights at all. As this mode of proceeding, which was adopted, and followed for a long period, was adverse to the correct cultivation, as a science, of the internal private law of states, or individual jurisprudence, so it likewise occasioned obscurity, in the cultivation, as a science, of the external law of states, or international law. But about the middle, and towards the close of last century, more correct and precise views came to be entertained by jurists, with regard to the proper sphere of coercive law, generally, as distinct from ethics,—of legality, as distinct from morality. And, while the rules of morality, or *præcepta virtutum*, continued to be held applicable to the assemblages of men, called nations, as well as to individual men, the *jus gentium* came to be held, as embracing only those rules of reciprocal conduct,—those juridical relations of states, those correlative rights and obligations, which have been called perfect, and which admit of being enforced, consistently with justice, reciprocity, and general expediency.

In order, therefore, to avoid the obscurity, arising from the confused nomenclature, or rather inaccurate arrangement, just alluded to, we shall exclude from our inquiries, what may be called the ethics, or morality, of nations ; and consider international law, as the collection of the rules, which regulate, or ought to regulate,

the external intercourse, with each other, of separate, and independent states. In other words we shall investigate only the legal, or juridical relations, which exist between, or among, the societies or assemblages of men, occupying particular portions of this earth, called nations; involving reciprocal rights and obligations, which are susceptible of being enforced, consistently, with justice, and general expediency, or the welfare of mankind, so far as practically attainable. And, under the more appropriate appellation of international law, here employed, as being now in general use, it will be observed, are comprehended, no part of the internal law of a state; neither the private law for the regulation of the conduct of the individuals, of whom the state is composed, in relation to each other, or jurisprudence; nor the public, or constitutional law, of states.

At the outset, also, and for the sake of perspicuity, and the more distinct understanding of the immediately following historical sketch, it may be proper, so far to anticipate, our more detailed discussion, of the different kinds, or sources, of international law, as to premise, that we hold that law, to be of only two kinds, natural, and positive. By the natural law of nations, we do not understand any law, founded upon, or derived from, an imaginary, and fictitious state of nature, antecedent to the social union, and which never had any existence; but as arising from the actual position on the surface of this earth, of the associated bodies of men, called nations, from the means by which they are destined to earn their subsistence, and to procure the various comforts and conveniences of life, from the intercourse, which they are enabled to have with each other, and

generally from the corporeal and mental constitution of mankind, and from the circumstances in which they are placed in this world, as ascertained by observation, and by the history of the species in past ages. By the positive law of nations, again, we understand, that law, or branch of law, which does not arise immediately, and solely, from the very constitution of mankind, as congregated into communities, and scattered over, and occupying various portions of this globe, but as recognised, and established, by the acts of men, either by express conventions and treaties between, or among, nations, or by long prevailing customs and usages, and habits of action, indicating the consent, and adoption by nations, of such rules of conduct ; thus distinguishing positive international law, into conventional, and consuetudinary.

Having premised these explanatory remarks, and, reserving for more detailed discussion, the different kinds, the sphere, the sources, the origin and progress, and the arrangement of the component parts, of international law, we shall first inquire, how that law has been cultivated as a science in ancient, and in modern times. And in this inquiry, we cannot do better, especially with reference to Germany, (where this department of law has been more cultivated, than in any other country,) than avail ourselves largely, not only of the concise statement of historical facts, but of the acute and impartial criticism, of Baron von Ompteda.

## SECTION FIRST.

*Of International Law in Ancient Times.*

THE curiosity of jurists, has searched in vain, the records of antiquity which have been preserved, for evidence of the scientific cultivation of international law. In their conduct to other nations, the Israelites were directed by special revelations of the Divine will. And with regard to the early nations of antiquity, who first formed themselves into large states, such as the Assyrians, Babylonians, Medes, Persians, and Indians, we have no authentic records of their international usages, in peace or war.

Among the Greeks, who viewed all the rest of the human race, as barbarians, we are not to look for the recognition of any very equitable measures for the regulation of their intercourse with other nations. Among themselves, however, they presented a number of small, separate, independent communities, connected by one common race or origin, and language ; a state of matters favourable for the growth of international law. Accordingly they seem to have made some progress in the recognition of the principles of that law. Thus, in the time of Themistocles, the Grecian states appear, to have been in the habit of sending ambassadors to each other, and of appealing to a common law of nations, according to which, one state could not prevent another from fortifying its towns with walls. Their philosophers too, such as Plato and Aristotle, inciden-

tally notice the existence of the rights and obligations of nations, towards each other ; without the observance of which, no state could long maintain itself. But even Aristotle, although he arranges the sciences, and even the different departments of the science of law, does not appear to allude to such a science, as treating of the disputes, and contests of nations, with each other, or of their reciprocal legal rights and obligations. And the fact seems to be, that the Grecian states recognised these principles of international law, which related to their wars, their leagues, the despatching of their own, and the reception, and treatment, of foreign ambassadors ; but chiefly, if not entirely, from the impulse of their feelings, of the justice of these rules, and of the necessity of their observance, for the welfare of their own states, without arranging them into any systematic form.

In the earlier, and better times, of the Roman State, the *fides publica* was maintained, and many of the rules of international law were in observance. During the times of their kings, the *collegium feacialium* was instituted ; and the duties of the *feciales* were to watch over the public interests of the state, to give their advice in whatever concerned peace or war, alliances, the treatment of foreign ambassadors, and other state transactions, with foreign nations. They were also sent as heralds, and ambassadors, to other nations on various matters of importance, during war, as well as in peace ; they pronounced upon the justice of wars to be undertaken ; they were in the practice of committing to writing their modes of proceeding, to serve as guides for the determination of future cases ; and there thus

grew up a sort of *corpus juris fecialis*, apparently embracing many of the doctrines of international law. *Belli, quidem, æquitas, sanctissime, feciali populi jure, præscripta est.\**

But this laudable institution does not appear to have long survived the liberties of Rome. Amid the commotions of intestine civil wars, it could be of little use. The name of *feciales* came to be a mere title of honour, and the institution disappeared, under the first emperors. Indeed it was not to be expected, that a people could long continue to recognise the principle of national independence in other states, whose policy, for a series of ages, was to subject to their sway, all the surrounding nations, whose empire came in time to embrace all the civilized part of the habitable globe, and who viewed all the nations beyond the imperial territories, as barbarians, with reference to whom, they did not consider themselves bound to observe the ordinary rules of justice.

The *jus feciale*, whatever may have been its doctrines, it is to be regretted has not reached modern times. But even Cicero does not appear to have had any very distinct notion of international law. For in ascribing to Cicero an acquaintance with international law, as a science, Grotius, as Von Ompteda observes, has not only erred himself, but has misled others. In the passage referred to by Grotius, in the *Proleg.* § ii. namely, *Pro Balbo*, chap. 6.; Cicero merely eulogises, as an orator, Pompey's knowledge, as a statesman, of leagues, treaties, the conditions of foreign nations, and of the universal law of war and peace; but, does not, as a philosopher, represent international law, as having

\* Cicero de Off. Lib. i.

been then cultivated as a science. And, in the two principal passages, in which Cicero makes mention of the *Jus gentium*, *de Offic. lib. iii. cap. 3.* and *cap. 6*, it is manifest, he means by that expression, nothing more, than the general *jus naturæ*, which is common to mankind, as rational beings, as distinguished from the lower animals, and which he opposes to the *jus civile*, or the internal peculiar legislation or *jurisprudence* of a state, by no means the reciprocal rights and obligations of whole nations, in relation to each other.\*

As little do the classical jurisconsults of Imperial Rome, from whose writings, the compilations of Justinian, or rather of Tribonian, were taken, appear to have had any distinct notion of international law, properly so called, as to have cultivated it as a science.

Thus, in distinguishing the *jus gentium* from the *jus civile*, at the commencement of his Institutions, so happily discovered recently at Verona by Bluhme, and edited by professor Goeschen, in 1824, the jurisconsult Gaius, who lived in the second century, obviously means by the *jus gentium*, not any body of rules, between nation and nation, in the modern sense of these terms, but that collection of internal regulations, which, all nations, who have made any progress in civilization, adopt, or use in common. "Omnes homines, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure, utuntur. \* \* \* Quod vero, naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque *jus gentium*, quasi quo jure, omnes gentes utuntur." Here the *jus gentium* is described as merely *inter*

\* Von Ompteda Litt. § 36.

*homines*, between, or among, individuals, of the same state; not *inter populos*, or *inter gentes*; although used by them, in common, within their respective territories.

Thus, in the same way, Ulpian, who lived in the third century, and whose fragments were corrected from the unique Vatican manuscript, and published in 1822, by professor Hugo; "*Jus gentium est, quo gentes humanæ utuntur; quod, a naturali recedere, facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus, inter se, commune est;*"\* obviously understanding by *jus gentium*, that branch of the internal law of a state, which is not peculiar to it, but which it enforces, in common with all other civilized nations.

Hermogenianus, also, who lived in the fourth century, describes the *jus gentium*, and this description, which seems to have puzzled Vattel, in his *Droit des Gens*, certainly approaches somewhat nearer to the true sense of international law, as now settled. Thus, "*Ex hoc jure gentium, introducta bella, discretæ gentes, regna condita, dominia distincta, terris termini positi, ædificia collocata, commercium, emptiones—venditiones, locationes—conductiones, obligationes, instituta.*" But of these matters, whose origin is thus ascribed to the *jus gentium*, only the three first, the introduction of wars, the separation of nations, and the foundation of states, are connected with international law, properly so called; all the rest belong to internal private law, or jurisprudence, or at least to that natural law, which is common to all individual men. This description, too, is placed in connexion with a fragment, in which Ulpian speaks of a *jus gentium*, which is obviously merely the *jus*

\* Dig. L. 1. § 4.



*naturæ*, common to all men. In the description itself, likewise, many things are mingled, which cannot be entirely derived from, or classed under, international law, properly so called. And, upon the whole, we may conclude, that Hermogenianus had not any more distinct notion, of what we now understand, by such terms, than the more illustrious Roman jurisconsults, who preceded him.

In the same way, Tribonian, whom Justinian employed, to compile his Digest and Institutions, from the writings of the classical jurisconsults of Rome, appears to have had no other notion of the *jus gentium*, than what was entertained by his more able predecessors, Gaius and Ulpian. Vattel seems to have some difficulty as to this matter; but the correctness of this observation is manifest, from a comparison of the passages, which in the composition of the Institutes, Tribonian excerpted from the works of these authors, and in which the words *jus gentium* occur. Indeed, it is plain, from § ii. of the *Institutes, de Rerum Divisione*, that Tribonian considered the *jus naturæ*, or *jus naturale*, and the *jus gentium*, as synonymous; for he expressly states, “Quarundam, enim, rerum dominium nanciscimur, jure naturali; quod, sicut diximus, appellatur jus gentium.”

The result of this investigation is, that the Roman lawyers had no accurate, or distinct idea, of what has been called, in modern times, the law of nations, or more correctly international law; but merely understood by the terms, *jus gentium*, the collections of those rules, which nations, who had made any progress in civilization observed in common, and enforced within

their respective territories. Such however, was the influence of the Digest, Institutes, and other compilations of Justinian, in the middle ages, that the meaning, attached by the Roman lawyers, to the term, *jus gentium*, was adopted by many authors, in later times. And it was, therefore, necessary to ascertain decidedly, what was really the meaning of these terms, as used by the Romans, in order to be able to judge of the works of many of these later writers.

## SECTION SECOND.

### *Of International Law during the Middle Ages.*

HAVING thus seen, how vague and indistinct, were the notions of international law, entertained in ancient times, and how little it was viewed, or cultivated, as a separate science, susceptible of systematic arrangement, we proceed shortly to trace its progress and cultivation, after the subversion of the Roman empire in the west, when the provinces, conquered by the northern nations, came to be divided into separate kingdoms, principalities, republics, or states. And, from this division of the Roman provinces, embracing almost the whole of Europe, among the different northern invading nations, into separate kingdoms, republics, or states, independent of each other, but of which the population was connected by various ties, and were, in time, led to frequent intercourse, from community of race, or origin, from strong affinity, though not identity of language, and from the adoption of the same religion, there can be no doubt,

arose, in the progress of ages, the positive law of nations, now known by the appellation of "*Droit des gens moderne de l'Europe*." But centuries passed away after the settlement of the northern nations, before this species of international law came to be recognised, among the great European kingdoms. Indeed as remarked by Dr Adam Smith, and as illustrated in the view we lately took, of the history of the private law of maritime commerce, the revival of civilization in the West took place, in an inverted order, and commenced with the rise of the small commercial republics, on the coasts of the Mediterranean. Accordingly the first rules of international law, appear to have originated, in the contests and wars, which the trading republics, of Venice, Genoa, Pisa and Florence, Marseilles, and Barcelona, particularly the Italian republics, carried on for ages, against each other; and the first traces of these rules, are to be found, in the record of the usages, of those republics, which were afterwards adopted by the greater European nations, on account of their wisdom, and equity.

These international usages of the middle ages, as recorded in the *Consolato del Mare*, we may probably consider more at length, in afterwards tracing the history of the maritime law of nations. At present we are investigating the cultivation of international law generally. And in this view, the industry of Von Ompteda has not been able, to discover any writer, on the subject, from the age of Justinian, during the period which elapsed from the sixth to the eleventh century, when the disorders produced by the successive invasions of the northern European nations, and also of the southern nations, from Africa and Asia, appear to have

been at the greatest height; nor even during the period, which elapsed, from the eleventh to the fifteenth century, inclusive. During both these periods, however, and particularly during the latter, although they produced no professed writers, on the subject, the international views, practice and usages of the European nations, underwent considerable changes; which are only to be studied in the chronicles of the times, and in international treaties and other state documents. To the elucidation of these changes, in the international usages of Europe, and their causes, Mr Ward has devoted the greater, and perhaps the more valuable part of the work which he published in 1795, "on the foundation and history of the law of nations in Europe, from the time of the Greeks and Romans, to the age of Grotius." And referring to that excellent and comparatively recent publication, we may merely glance at the principal causes of these progressive improvements, in the national intercourse of the European states.

The division of Europe by the northern nations, into so many independent kingdoms, principalities and states, though not contemplated by the authors of such division, tended, as already observed, to produce a state of things favourable to the growth and development of international law. The pure morality and mild precepts of the Christian religion, when once adopted by them, although the effect did not appear so early, or to such an extent, as might have been expected, could not fail to exert a salutary influence on the reciprocal conduct of nations, as well as of individuals. Nay, even some of what we have been accustomed to consider, as the abuses of Christianity, during the middle ages, such as

the absurd pretensions and exorbitant powers, actually exercised by the Popes and the higher clergy over the sovereigns of independent states, had, in one respect, rather a beneficial tendency, in as much as they promoted a systematic habit of intercourse among the rulers of the European nations. At the councils, held from time to time, by the Popes, the sovereigns in person, or by their ambassadors, the dignified clergy, the officers of state, some of the nobles, and many of the more influential classes of the different European nations, were accustomed to assemble in a sort of parliament, to deliberate upon matters of common interest. And whatever opinion we may entertain of the motives, which led to the Crusades, there can be no doubt, that while they enriched the trading republics of Italy, these expeditions to the Holy Land brought the European sovereigns, princes, nobles and people, more in contact with each other; promoted mutual acquaintance, and increased that habitual intercourse in commerce and otherwise, which required regulation.

The feudal system, as it is usually called, or the internal government of a people, constituted by the tenure of land for military services, descending in gradation, from the sovereign or king to the nobles and other great vassals, and from them downward, through a series of overlords to inferior vassals, was not likely, of itself, to improve the international law of Europe. And the right of private war, as it was termed, claimed by the feudal barons, or subordinate chieftains, although repressed for a time, by the enlightened and powerful genius of Charlemagne, continued, with that exception, to prevail during almost the whole of the period we

are now contemplating. At the same time, the similar, and common nature of the feudal government, established by the different European nations, led to an intercourse, which would not otherwise have existed. And the extravagant powers held to be vested in sovereign princes, and other great feudal superiors, over their vassals, although these vassals were themselves frequently sovereign princes, produced an interference, and reciprocal connexion, between independent kingdoms, in their respective internal concerns, which would not, otherwise, have taken place.

As shown, too, by Mr Ward, there arose out of, or at least, during, the prevalence of that system of government, an institution, which certainly had considerable influence, in restraining the fiercer passions, and softening the manners of the European warriors. We allude, to what is usually designated, by the term Chivalry. The different orders of knighthood, throughout the different European kingdoms, constituted a comparatively high-minded class of individuals, bound by a sense of honour, who detested and opposed all brutal ferocity, and disclaimed all low malice, and mean cruelty. And the diffusion of such sentiments behoved to influence, and did materially influence, the usages of war, and sometimes diminished, if it did not prevent, the effusion of human blood.

The intercourse among the different nations, into which Europe came to be divided, arising from the causes, to which we have just referred, led also to frequent conventions, or treaties, among these nations. These treaties were of various descriptions. Treaties of marriage were among the most important, both in the dis-

tribution,—in the union, or separation, of the territories, of which Europe is composed, and in the frequent and lasting wars, in which they involved nations. There were also treaties of sale or renunciation, of protection and of confederacy, which last connexion became so close, so permanent, and so powerful, in the case of the Hanseatic league, as, in a manner, to create for a considerable period, a sovereign state, composed of distant cities and towns. There were also treaties of common cause, auxiliary treaties, treaties of subsidy, and treaties for aiding the internal police of states. In the progress of time also, conventions for protecting and facilitating commerce became as important as, if not more important than, any others. And by these different treaties, or conventions, various points of otherwise doubtful right, came to be fixed among the different European states; such as particularly the rank and precedence of these states.

Amidst the almost total want of exposition, or illustration, from contemporaneous writers, during the long period which elapsed from the subversion of the Roman empire in the west, to the fifteenth century inclusive, the students of international law are much indebted to the ingenuity of Mr Ward, in exhibiting the meliorations which that law underwent, during that long period, from the influences of the internal institutions of these nations, or their reciprocal intercourse, and in pointing out the sources, from which such information is to be derived; namely, the treaties, conventions, and other State documents of these times, which have been preserved, and are collected by Leibnitz, Rymer, Muratori, Dumont, Rousset, and others. And, while it certainly

is not to be regretted, that Mr Ward should, in the more advanced period of his life, have devoted his leisure to that lighter species of literature, in which he has so delighted the more polished circles of English society, the student of international law may be permitted to wish, that he had also found leisure, to render more perfect, his juvenile historical work; and that, instead of only coming forward, no doubt most opportunely, with detached essays, in vindication of the just claims of his country, on occasions when they were assailed, he had erected a more complete and permanent monument to his own fame, by presenting the world with a scientifically digested book of international law, in both peace and war.

### SECTION THIRD.

#### *Of International Law during the Sixteenth Century.*

So much for the progress of international law, during what have been called the middle ages, or prior to the sixteenth century. Even during that century, compared with those that succeeded, there are few works on that department of law; and before noticing them, we may mark another important improvement, in the practice of that law, which made its first appearance in the course of that century. The practice, and almost recognised right, of sending ambassadors, may be traced to the earliest and rudest ages of society; indeed, there could not otherwise be any mode of communication or intercourse between, or among, independent tribes, or



nations. But this is very different from the custom now so universal in Europe, of the different sovereign states having public ministers, permanently resident at the courts, or in the capitals of each other. This practice was unknown to the ancients. It appears to have been equally unknown to the modern less civilized nations of Asia, Africa, and America, so far as not emanating from Europe. It does not appear to have commenced, even in Europe, till the sixteenth century. And the origin of this practice of the European sovereigns, having ordinary and resident embassies, at the courts of each other, is to be ascribed, it should appear, to the causes we have just been considering.\* And when once introduced, the advantages of the practice could not fail to be felt, as facilitating measures for the general good, for the maintenance of a due balance of power, and for the protection of the weaker states against the aggressions of the stronger, and more ambitious.

On the other hand, in the course of the sixteenth century, one of the previous principal ties of union, among the Christian nations, underwent a great disruption, through the Reformation in religion. For it must be admitted, that however beneficial the reformation was, not merely in a religious point of view, but also in the promotion of civil liberty, the result, in the mean time, was the direction of the arms of the European nations, not against the infidels as formerly, but against each other; until these wars were put an end to, by the prevalence of more enlightened views of religious

\* Ward, Vol. II. p. 478.

toleration, and by a conviction, from experience, of the importance of the maintenance of a balance of power, in Europe, for the security of independent states.

To proceed to the writers on international law, in the sixteenth century, it is well known the great work of Grotius did not make its appearance, till the beginning of the following century, (1625,) and the various attempts which were made to depreciate the merits of Grotius have been justly reprobated. But on the other hand, it is necessary to guard against the disposition, so generally prevalent among historians and other writers, to ascribe a great deal more, than is their due, to great conquerors and lawgivers, and to attribute frequently to individual exertions, what is the result of the accumulated experience, and practical progressive improvement of the particular community or nation, or of the species in general. And, without, in the slightest degree, detracting from the merits of so great a man as Grotius, who contributed so much to the improvement of international law in Europe, it seems but justice to his predecessors, and due to the truth of history, to endeavour to ascertain, what these predecessors had been able to accomplish, in this department of science.

In 1506, Oldendorp, afterwards professor at Marburg, published a work, which may be considered as the first system of natural law, although almost unknown in these more recent times; entitled, *Isagoge, seu elementaria introductio Juris Naturæ, Gentium, et Civilis*. The title, at least, of this work, obviously contemplates the law of nations, as a separate science; for, along with the *jus naturæ* and *jus civile*, it promises

also an *introductio in jus gentium*; and the third section of this book, which is superscribed *de jure gentium*, is particularly devoted to that subject, opposes the *jus gentium* to the *jus naturæ*, and maintains the former to be different from the latter. But in perusing the beginning of this section, we find, Oldendorp had no distinct or accurate idea of the law of nations, and in fact understood by it nothing else than the law of nature, so far as it can be shown to have been actually adopted by nations, and fixed and established by them in their internal institutions and usages; in other words, *determinatio juris naturalis*.

Another learned jurist, Vasquez, a Spanish civilian, who lived about the same time, (1509–1566,) entertained different, but not less inaccurate ideas on this subject. In his *Controversiæ Illustres*, Lib. ii. C. 54. § 2—6, Vasquez incidentally treats of the law of nations, and appears to have been the first, or one of the first, who divided that law into *jus gentium primævum*, and *secundarium*, a distinction so frequently used in subsequent times. By *jus gentium primævum*, he understood the mere *jus naturæ*. By *jus gentium secundarium*, he understood the civil laws, institutions, and ordinances, adopted by the greater part of nations, or the *jus civile*, in so far as it is common or uniform among these nations, although without any convention, or obligatory connexion of the one nation with the other. “*Jus gentium secundarium*,” he says, “*naturale non tam est, quam positivum; nam ea omnia, quæ sunt juris gentium, prius fuerunt juris tantum civilis; sed paulatim serpsērunt, aut velociter transvolārunt ad reliquas gentes et regiones; sicque, cum primum, ab*

uno vel altero homine vel regione, inventum fuisset, et receptum, tum juris tantum civilis, non etiam juris gentium, id fuit. Postquam, vero, eo jure omnes omnino, aut pleræque aliarum gentium, uti quoque cœpissent, jam juris gentium effectum videtur, inque jus gentium conversum, et transformatum est. Quemadmodum et ex diverso, si quod hodie juris gentium est, in desuetudinem abhinc forte cœpisset, ita ut penes unam tantum provinciam maneret, sine dubio, juris gentium esse desineret, et jam juris tantum civilis, diceretur." Such a confused notion of the *jus gentium* obviously originated in the signification attached by the Roman lawyers to these terms.

About the same time with Vasquez, there lived another learned Spanish jurist, Suarez, (1548–1617), who in his work, *De Legibus et Deo Legislatore*, propounds far more correct ideas of international law; but of whom, it is remarkable, Grotius makes no mention. After distinguishing the *jus gentium* from the *jus naturæ*, he observes of the former, Lib. ii. C. 19. No. 9; "Ratio hujus juris est; quia humanum genus, quamvis in varios populos et regna divisum, semper habeat aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale præceptum mutui amoris et misericordiæ, quod ad omnes extenditur, etiam extraneos, et cujuscunque nationis. Quapropter, licet unaquæque civitas, respublica, aut regnum, sit in se communitas perfecta, et suis membris constans, nihilominus quælibet illarum est etiam membrum aliquo modo hujus universi, prout genus humanum spectat. Nunquam, enim, illæ communitates adeo sunt sibi sufficientes sigillatim, quin indigeant aliquo mutuo juvamine et societate, ac com-

municatione, interdum ad melius esse, majoremque utilitatem, interdum vero, et ob moralem necessitatem. Hac ergo ratione, indigent, aliquo jure, quo dirigantur, et recte ordinentur in hoc genere communicationis et societatis. Et quamvis, magna ex parte, hoc fiat per rationem naturalem, non tamen sufficienter et immediate quoad omnia; ideoque specialia jura potuerunt usu earum gentium introduci.’” It thus appears clear, says Von Ompteda, that Suarez had taken the right road; and the only misfortune is, that he did not prosecute the matter farther.

But of all the writers on the-law of nations, during the sixteenth century, Albericus Gentilis approached nearest to the correct view of the subject. He was by birth an Italian, but left his native country on account of his religious opinions; went to England in the reign of Queen Elizabeth; lived there for many years, and was professor of law in the university of Oxford. He was one of the most acute jurists of his age, and of more extended views than his predecessors, or contemporaries. He is, indeed, the first jurist who rendered any essential service to international law, as a science. Although the authors before noticed, and several others of less merit, partly theologians, partly jurists, whom Grotius mentions, had already written on the same subject, they did so only incidentally, and in passages scattered through their works. Gentilis was the first who treated these matters, as objects, or branches of international law.

He wrote several able treatises, *De Jure Maris*, *De Legationibus*, and *Hispanicæ Advocationis libri duo*, published after his death. But his *magnum opus*

was, his *De Jure Belli libri tres*, dedicated to the earl of Essex, in the reign of Queen Elizabeth, and reprinted at Hanover in 1598. In this treatise he seems to have formed a pretty correct notion of the *jus gentium positivum*, and expounds it, as what has arisen *ex compacto gentium* ; adding, “ *Ista, tamen non sic sunt capienda, quasi convenerint unquam gentes omnes, et jus illud constituerint. Sed quod successim placere omnibus visum est, id totius orbis decretum et consilium fuisse, existimatur;*” thus apparently, however, directing his views more to the *jus naturæ commune*, introduced internally among the greater part of nations, through customs and usages observed for ages, than to the proper law of nations, in the more modern sense of that term.

In the first book of his work, *De Jure Belli*, Gentilis defines war, and treats of *national belligerents*, as distinct from robbers and pirates ; and of the causes of war, as necessary in self-defence, or as otherwise just, and expedient. In the second book, he speaks of the declaration of war, of the mode of carrying it on, of treaties during war, truces, &c., of the treatment of prisoners, and conquered population generally, of devastation, of the interment of the dead. In the third book, he treats of the termination of war, and the restoration of peace, of the rights of the victor over the conquered country, and of changes in its political, civil, and religious institutions ; of treaties, leagues, and alliances ; of armies, fleets, fortresses, &c. ; of the obligations of the successors of the parties, who have concluded treaties.

In this work, it thus appears, Albericus Gentilis

embraces most of the subject of international law ; his arrangement is pretty good. He does not, like most subsequent writers on the law of nations, introduce extraneous matter, such as the private internal law of states, or jurisprudence, or the public or constitutional internal law of states. And he discusses the different subjects before enumerated, with abundance of learning, and great acuteness. But his habits of thought were, of course, affected by the manners and taste of the age in which he lived. He was too desirous of supporting the doctrines of international law by those of the civil law of the Romans, and appealed to authorities of the middle ages, not now considered of the highest grade. He has also been accused of inconsistency. Certainly in his reasoning, he had more the habits of the advocate, than of the judge. And the merits of his work have been obscured by the superior and more splendid work of Grotius, which appeared early in the following century.

After such approximations by Suarez and Gentilis to what is considered the true and correct view of the law of nations in modern times, it is perhaps going too far, with all his high deserts, to eulogize Grotius, as the discoverer, or creator, as he has been called, of this science. But he is unquestionably the first most eminent expounder of international law. His work formed a great era in its history. And we shall follow the example of Von Ompteda, in dividing our sketch of the subsequent history of international law in Europe, into the following periods, each distinguished by material differences and changes in the mode in which that law was cultivated :—From the age of Grotius, 1625, to that of Pufendorff, 1678 ; from the

age of Pufendorff, 1673, to that of Wolff and Moser, 1740; from the age of Wolff and Moser, to that of Von Ompteda and Von Martens, 1785-1790; from the age of Von Ompteda and Martens to the present time; during which the works of Schmalz, Klüber, and Schmelzing have made their appearance.

#### SECTION FOURTH.

*Of International Law during the Period from the age of Grotius to that of Pufendorff, 1625-1673.*

THE life of Grotius was so connected with the political events of his times, that, independently of his merits as an author, the particulars of it are more generally known than those of the lives of most lawyers. His great work, *De Jure Belli et Pacis*, was translated into French in 1724, by Barbeyrac, with valuable notes by that able translator; was with those notes translated into English, in 1738; was commented on by Dr Rutherford, in 1754, in his learned *Institutes of Natural Law*, and was again translated into English, a few years ago, by the Rev. A. C. Campbell. Besides the narratives, too, of the general historians of modern Europe, Mr Hallam has very lately, in his view of the literature of the middle ages, devoted a considerable portion of one of his volumes to the great work of Grotius, so as to render it accessible, if not, in some measure, familiar, even to mere general readers.

In these circumstances, it seems unnecessary, to



repeat here, what has recently been better told elsewhere. And we shall, therefore, content ourselves with reciting here, the account of the work of Grotius, by his eulogists, Barbeyrac and Ward, as condensed by the latter, the digested view of the contents of the work by baron Von Ompteda, and the criticism of it by the Abbè de Condillac.

“The method,” says Mr Ward,\* “which Grotius pursued, in order to produce a work, which although coming from a private man, should have the weight of a code of laws, with princes, he has himself expounded to us, with great clearness in the preface. He found it necessary to get at some certain fixed principles, which should be acknowledged to be such, by all who read them. In order to do this, he was obliged to survey all the codes of morality and of general law, which had ever been known; he penetrated into all the sciences between which and his own, he could discover any analogy; and he examined the opinions of all great men of whatsoever class, from which he could extract anything like a community of sentiment. This, being properly arranged under its different heads, together with the vast additions of his own learning, and the support of all that could be drawn from history, by way of precedent, he ventured, with very noble ambition, to imagine, might be received by the world, as the rule for their duty in the most critical predicaments. The event answered all his expectations.

“The work of Grotius, therefore, has for its support, all that the philosophers, the poets, the orators, and

\* Vol. II. pp. 618—620. Inquiry, Law of Nations in Europe.

the critics of antiquity, or of modern times, can furnish. It is aided by all the lights which can be drawn from the famous Civil Law, cleared from the defects and false glosses which had been put upon it by corrupt or ignorant interpreters ; above all, it is finally corrected, and stamped with authority, by the indications of the Divine will, as collected from the inspired writers of the Old and New Testament, from the comments of the Hebrew divines, and the authority of the fathers.

“It is not surprising, that a code, thus supported, should have immediately advanced into celebrity, and put down in the end, those various heterogeneous compositions, which had, till then, formed the rule of conduct for nations, and occasioned many of those discordant arguments and cases, which we have recited. The elector palatine, Charles Lewis, was the first prince who had the honour to be the real patron of the work ; for although it came out, dedicated to Lewis XIII., yet it was strangely neglected by that king, who gave no reward to the author. The elector, however, struck with its utility, ordered it to be taught publicly in his university of Heidelberg ; and founded a professor’s chair, for the express purpose of teaching the law of nature and nations. At the same time, the envy of the learned was almost equal to the merit of the writer. Parties were formed amongst them for the attack, and the defence of the code ; and those who defended it, were stigmatized with the name of Grotians.

“The sound strength of Grotius, however, soon overcame such puny opposition, and he had the satisfaction of observing the progressive reputation of his

code. It became very early the favourite study of the great Gustavus, who is said to have found as much pleasure from it, as Alexander found from reading the poems of Homer; and who proved his admiration of the author, by ordering him to be called to the public employment of Sweden. In 1656, it was taught in the university of Wirtemberg, as public law; and in about sixty years from the time of publication, it was universally established in Christendom, as the true fountain-head of the European law of nations.”\*

Along with this eulogy, perhaps rather highly coloured, Mr Ward admits the defects of method in the treatise *De Jure Belli et Pacis*; Thomasius having previously remarked, and Leibnitz having agreed with him, *Grotii ordinem, si non optimum, certe nec pessimum*. “Although Grotius had taken a most extensive range, and endeavoured to search the duties of nations in war and peace, to the bottom; yet the lovers of abstract reasoning, independent of particular application, found that there was something wanting to the perfection of his science. He had entitled his work, the Laws of War and Peace, in order, says Barbeyrac, to engage the attention of statesmen and generals, whom it most concerned to understand them. He was forced, therefore, to plunge at once into his subject; and although, as he goes along, he satisfies his readers as to the reasons for their duties; yet it is by arguments taken up, as it were, *pro re nata*, the elements of which are supposed to be already understood; or, if elementary principles are necessary for the elucidation of the point

\* Barbeyr. Pref. to Grotius.

before him, a long discussion branches out from the immediate subject, which, we feel, would be better disposed of, somewhere else; in the same manner, as if, in proving a proposition of Euclid, we had not gone over the preliminary propositions, on which it was founded, but were obliged to stop in the middle of it, to prove the fundamental position.”\*

Having premised Mr Ward’s eloquent *elogé* of Grotius, we proceed, with baron Von Ompteda, to examine the work, *De Jure Belli et Pacis*, a little more minutely. And although this work has undoubtedly been the basis of all that has since been written on the law of nations, properly so called—and no writer on this department of law, could possibly avoid referring to Grotius—yet very few have viewed it as the chief or fundamental work on the science of international law, and as designed to treat of that science, and of nothing else. On the contrary, most people have viewed it throughout, in another and different light. “Indeed, it is almost inconceivable,” observes Von Ompteda, “but nevertheless true, that among the prodigious crowd of commentators and translators, who have dissected, investigated, and illustrated his works, scarcely a single writer has contemplated the subject, in the precise point of view, in which Grotius did, or judged correctly of his intention and design.† Almost all, in fact, appear to consider his work as a compendium or brief system of the general law prescribed by reason, and believe it was the design of Grotius to treat, in it, of the law of Nature in

\* Ward, II. pp. 622, 623.

† Von Ompteda, Lib. § 54.

general. But this view is erroneous. It is, no doubt true, that as he wished to discuss a subject which is so nearly connected with the law of Nature, and has been held to take from it, its groundwork and leading principles, he behoved to notice that science; and he certainly enlarges upon it, on many occasions, rather prolixly, and adduces more subtle distinctions and definitions, than he might have found necessary, if he had adhered exactly to his original design. But upon nearer investigation, it will be found, that it was never his intention, to make the law of Nature, in its whole sphere, or range, *ex professo*, the object of his inquiry; and that he originally restricted himself to that department of law, which establishes the relations of nations, and of their governments, to each other, and which alone correctly bears the name of international law, or rather solely to that branch of international law, which treats of the laws of war." This, baron Von Ompteda shows, is manifest, from an attentive perusal of the introduction and of the contents of the whole work, and appears also from the letters which he wrote at the time he was engaged in its composition, to his brother and other friends; "Ego, absoluto Stobæo, do operam commentationi de Jure Belli; sed lente satis procedo."

In the introduction, Grotius, in the first place, expounds the fundamental nature and advantages of the law of nations; and the division of law, generally, into natural, divine, civil, and international. He then directs his attention to the laws of war as an important part of the latter; points out the causes, which lead, or excite to it, to be treated of in the sequel; specifies

the divisions of the work; notices the preceding writers on the law of nations; explains the sources, from which he derived his information; and finally, speaks of the manner in which he has handled his subject.

In the first part of the work itself, in order to elucidate the expression, *Laws of War*, he expounds first of all, the general nature, as well of war, as of the different kinds of law. In chap. i., he shows, that it may not be altogether unlawful to make war. In chap. ii., he lays down the distinction between public and private war; which carries him to the investigation and ascertainment of the highest power in the state. And in chap. iii., he is thus also led to the relation between sovereigns and subjects, between whom war cannot well take place; and hence he deduces the general principle, who shall be entitled to carry on war?

The second part of the work is chiefly devoted to the exposition, and discrimination, from one another, of the manifold occasions of war. And, since in all the relations, as well of individual men, as of whole communities or states, between or among each other, there arise occasions for the use of physical force, or war, Grotius enlarges at great length on all these. In chap. i., he treats of the relations, which exist, among private individuals, concerning the defence of their persons, and the protection of their property; in chap. ii., of property generally; in chap. iii—x., of the manifold modes of acquiring and losing property; in chap. xi. xii. xiii., of promises, contracts, and oaths of private individuals; in chap. xvii., of indemnification, or reparation for damage illegally done; in chap. xx. and xxi., of punishments, and participation in crimes

and punishments ; in chap. xiv., of the private promises and contracts of princes ; and finally (what truly belongs to the proper law of nations) ; in chap. xv. and xvi., of public treaties and their interpretation ; in chap. xviii., of the law of embassy ; and from a strange mingling of subjects, in chap. xix., of the rights of sepulture. After he has, in this manner, gone over all the individual occasions of war, he still treats, in chap. xxii., of unjust causes of war ; in chap. xxiii., of doubtful causes ; in chap. xxiv., of the grounds for not commencing war at any rate, even for just causes ; in chap. xxv., of wars, which are undertaken, for the sake of others ; and in chap. xxvi., of the motives of private individuals for allowing themselves to be employed in wars.

In the third and last part, the author treats of the carrying on of war itself, and of the various events and occurrences in the course thereof, agreeably to the principles of the law of nations. And in detail, he treats in chap. i., of what is lawful in war ; in chap. ii., of reprisals ; in chap. iii., of the declaration of war ; in chap. iv. xi., of the right of the enemy to the dead ; in chap. v. xii., of booty, or plunder in war ; in chap. vi. xiii., of acquisition by war ; in chap. xiv., of prisoners of war ; in chap. viii. xv., of the conquered ; in chap. ix. xvi., of postliminium ; in chap. xvii., of neutrality ; in chap. xviii., of privateering ; in chap. xix., of good faith between enemies, and in the observance of treaties ; in chap. xx., of treaties, by which the war is terminated, of appeal to chance, of single combat, of compromise, of voluntary surrender ; and of the confirmation of treaties, by hostages and pledges ; in chap.

xxi., of treaties during the war itself, as truces, passports, release of prisoners; in chap. xxii., of treaties by military commanders, and consequent responsibility; in chap. xxiii., of the promises of private individuals in war; in chap. xxiv., of tacit obligations in war; and finally, in chap. xxv., he concludes with exhortations to peace.

From this brief review, it sufficiently appears, that the original plan of Grotius was in reality only to treat of the laws of war; but that, in the course of his work, he has not left any object of the law of nations generally untouched; so that the work may be considered, as in a manner, a text-book, or elements of the natural and positive law of nations combined. With regard to the execution of the particular parts of the work, it must also be admitted, in justice to Grotius, that he performed all that could reasonably be expected, in an undertaking so extensive, and so difficult, in the times in which he lived. He arranges the particular subjects in pretty good order; he gives in each clear ideas of what he is to treat; he then expounds, with much acuteness, although frequently with excessive subtilty, the requisite distinctions; he next establishes the necessary fundamental principles; and he finally illustrates each position, with copious, and for the most part, well-chosen examples, from ancient history. At the same time, it can, on the other hand, as little be denied, that in this in itself excellent mode of treating the subject, many defects occur. He often does not sift the matter to the bottom, or exhaust the subject; and creates obstacles, by divisions, subdivisions, and manifold superfluous subtilties, diverting him from his



principal object. He frequently diverges from the law of nations, properly so called, and dwells too much on the general public or constitutional internal law of states, on the private law of states, or jurisprudence, and on other matters, not belonging to international law. Nay, many times he mingles with it, the Roman law. And what is least agreeable in his work, he labours, according to the style and mode of writing of these times, to exhibit his vast learning; for every page is filled with an intolerable number of quotations from Latin, Greek, and even Hebrew writings, which might very well serve as an embellishment, but which are so abundant, that the matters previously treated, are almost hid and buried among them. Notwithstanding, however, all these defects, the excellencies of the work still preponderate; and it will certainly never cease to be duly appreciated, and to continue in deservedly high estimation.\*

We may conclude, as formerly proposed, our account of the great work of Grotius, with the following criticism of that acute metaphysician, the Abbé de Condillac,† who, however, seems to have erred in ascribing to Grotius, the intention and design of composing a complete system of the law of nature, as well as of the law of nations. “Quoique Grotius eût pour objet, d’établir les principes du droit naturel, du droit des gens, et du droit public, et de résoudre d’après ces principes, les questions, qui intéressent le bonheur des peuples, il intitula son ouvrage, *Le droit de la guerre, et de la*

\* Von Ompteda Litteratur, § 60.

† Cours d’Etude (Histoire Moderne Tom. V.) Vol. XV. pp. 362-3.

paix. Il parut par-là, se renfermer, dans un plan moins étendu, que celui, qu' il se proposait; mais il usa de cet artifice, parce qu' il écrivait dans un tems ou ce titre devait, plus que tout autre, attirer l' attention des puissances de l' Europe. Il eut la gloire d' avoir pour lecteur le grand Gustave, qui, désirant de s' attacher un écrivain, dont il estimait les talens, était au moment de l' appeler à son service, lorsqu' il fut tué en 1632, à la bataille de Lutzen. Peu de tems après, le chancelier Oxenstiern, qui ne l' estimait pas moins, se fit un devoir de se conformer aux intentions du Roi son maître, et nomma Grotius ambassadeur de Suède à la cour de France.

“ Grotius est en effet un homme de génie, qui commence à répandre la lumière. Malgré les progrès, que faisait l' esprit humain, les puissances de l' Europe, dans la plus grande ignorance des matières qu' il traite, ne songeaient pas même, à s' en instruire; et il semble leur enseigner l' art de defricher des terres, que les barbares avaient jusqu' alors laissées sans culture. Cependant ses principes ne sont pas toujours exacts. Il ne les développe pas assez; il manque de méthode. Il raisonne avec profondeur; mais il est difficile de le suivre, parce qu' il n' a pas su saisir cet ordre simple, qui ne se trouve, que dans la plus grande liaison des idées, et qui rejette tout ce qui est superflu. Enfin il embarrasse ses raisonnemens, en prodiguant l' érudition pour les éclaircir; et il juge d' après l' autorité, quoiqu' il fût capable de mieux juger par lui-même. Malgré ces défauts, qui sont ceux de son siècle, son ouvrage mérite d' être étudié. Il a créé une Science, qui serait la plus utile, si elle était connue; et il a éclairé

ceux, qui après lui s' y sont appliqués avec plus de succès.<sup>22</sup>

Notwithstanding the great respect and admiration, which the work of Grotius inspired, the peculiar mode, in which he had begun to cultivate the law of nations, made, at the beginning, but a slight impression; and in the course of half a century, it came to be in a great measure, forgotten, or neglected, partly perhaps, from Grotius having in his work mixed up with international law, discussions on the Roman law, or private jurisprudence, and on the constitutional law of states; but chiefly in consequence of the attention paid to the different method of studying the science of the law of nations, which arose out of the mode, in which the learned Pufendorff treated the *jus naturæ et gentium*. But before proceeding to trace the effect of Pufendorff's writings, we may shortly notice the other writers on international law, who lived in the interval between 1625 and 1673, and these are chiefly English.

In his work entitled, *Elementa Philosophica de Cive*, published in 1642, Hobbes gives the following idea of the law of nations. He divides the whole of law into divine and human. The former, he says, is "vel naturale vel positivum; the latter is vel naturale hominum, quod solum obtinuit dici lex naturæ; et naturale civitatum, quod dici potest, lex gentium, vulgo autem jus gentium appellatur. Præcepta utriusque eadem sunt; sed quia civitates, semel institutæ, inducunt proprietates hominum personales, lex, quam loquentes de hominum singulorum officio, naturalem dicimus, applicata totis civitatibus, nationibus, sive gentibus, vocatur jus gentium. Et quæ leges, et juris naturalis elementa, hactenus tra-

dita sunt, translata ad civitates, et gentes integras, pro legum et juris gentium elementis, sumi possunt.”\* Hobbes thus gives a pretty correct idea of the natural law of nations; but makes no allusion to any other sources, or component parts, of international law; and directs his objections and attacks solely against the doctrines of the general and common law of nature.

In a brief review of the authors, who have written on international law, Selden, another contemporary of Grotius, deserves a place, not only on account of his *Mare Clausum*, composed in opposition to the treatise of Grotius *de Mari Libero*, but also on account of his work published in 1650, *De Jure naturali et gentium, juxta Disciplinam Ebræorum*. Although he proposed to confine himself solely to the principles of natural law, which were prevalent among the Hebrews, he goes into the whole science, and touches upon the law of nations, or *jus gentium*; but in a very inappropriate sense of that term, namely, in a great measure, the sense which was usual among the Greeks and Romans, and early Christian writers. “Gentium jus,” says he in his preface, “interdum, pro jure, item, naturali, sumitur; quoties nimirum, primævi, seu primarii, nomine, indigitatum \* \* \* Et jus naturale, ita significat hic, quod jus mundi, seu universale; gentium, jus id, quod gentibus aliquot peculiare.” So far Selden cannot be reckoned among the teachers of the law of nations, properly so called. Yet the following passage of his *Mare Clausum*, shows he had a distinct understanding of the true positive law of nations. “Inter-

\* Cap. XIV. § 4.

veniens, autem, jus gentium, dicimus, quod, non ex communi pluribus imperio, sed interveniente, sive pacto, sive morum usu, natum est; et jus gentium secundarium, fere solet indigitari."

There still remains a third contemporary of Grotius, Dr Richard Zouch, professor of law at Oxford, and afterwards judge of the high court of Admiralty of England; who does not appear to have had that justice done, in his own country, to his reputation, as a cultivator of international law, to which his merits entitle him, as certainly placing him, at that time, next in rank to Grotius. Among other learned treatises, he published in 1650, a work entitled *Juris et Judicii Fecialis, sive Juris inter Gentes, et Quaestionum de eodem, Explicatio*; which may be viewed as the first elementary treatise on international law, natural and positive combined.

In his preface, Zouch announces, that, while he has hitherto treated, in different writings, of rights generally, as well as particularly, and of the rights, which exist between private individuals in relation to each other, as well as between private individuals and princes or sovereigns, he now likewise intends to investigate these rights, which are involved in the relations of princes or sovereigns, and of nations between or among each other; "explicationem eorum, quæ ad communionem, quæ inter diversos principes aut populos intercedit, conducunt." And, in illustration of this general definition of the law of nations, he divides it into natural, into that which is founded upon the tacit consent of nations, and into that which is founded upon the express consent of nations, as declared in their

treaties and confederacies. His words are remarkable. "Cum multi diversis temporibus, idem affirmant, id ad causam universalem referri debeat, quæ alia esse non potest, quam recta conclusio ex naturæ principiis proveniens, aut communis aliquis consensus, e quibus, illa jus naturæ indicat, hic jus gentium. Deinde, præter mores communes, pro jure etiam inter gentes habendum est, in quod gentes singulae cum singulis inter se consentiunt; utpote per pacta, conventiones, et fœdera; cum communis reipublicæ sponsio legem constituat; et populi universi, non minus quam singuli, suo consensu obligentur." It may therefore be said, that Zouch is the first who sketched an outline of the law of nations, in its whole extent theoretical, as well as practical. And that he not only knew the law of nations in its full extent and range, but also treated it, in detail, appears from the following short extract from the contents of his work. "Part i. De Jure inter gentes, sect. 1-5, De Jure Pacis &c.; sect. 6-10, De Jure Belli, &c. Part ii. sect. 1-5, De Judicio inter gentes, et de Quæstionibus Pacis, viz., de quæstionibus Statûs, Dominii, Debiti, Delicti, inter eos quibuscum Pax est; sect. 6-10, De Quæstionibus Belli, viz., de quæstionibus Statûs, Dominii, Debiti, et Delicti, inter eos quibuscum Bellum est."

The arrangement observed in this book is perhaps far from the best, and it cannot be denied, that much superfluous matter is introduced, which belongs partly to general state, or constitutional law, partly to the particular constitutional law of Germany, partly to other sciences. And as little can it be denied, that much is treated according to the peculiar taste of those

times, and occasionally not very profoundly. But, on the other hand, it appears, even from the contents before recited, that almost nothing belonging to the law of nations is omitted. And this amplitude distinguishes advantageously this otherwise small book, when compared with many of the previous and subsequent voluminous works. As the first of its kind, it is valuable ; and even now, is in some measure practically useful. It is composed more in an historical style of narration, than in a didactic style ; yet sufficiently illustrates the propositions which were to be maintained. And it is superior to the preceding, and to most of the subsequent manuals, or text-books of the law of nations, inasmuch as examples are subjoined, drawn not merely from ancient, but also from times immediately preceding its composition.

Zouch also with great acuteness, and foresight, makes use of the expression, *jus inter gentes*, instead of, and in preference to the *jus gentium*. And, while by the former he understands and distinguishes the law of nations, as peculiarly treated by him, he relinquishes the denomination, *jus gentium*, to that general and common law of nations, which was designated and understood by it, when used incidentally in ancient and even in early modern times. In later times, Chancellor D'Aguesseau first, and then that acute jurist Mr Bentham, took credit to themselves for pointing out this distinction, and more appropriate appellation ; neither of them apparently aware, that they had been anticipated in this discovery by Dr Zouch, in the course of the preceding century.

During the period between Grotius and Pufendorff,

Germany does not appear to have produced any writer, who contributed much to the advancement of the law of nations, beyond expounding Grotius. And the talented Dutch jurist, Benedict Spinoza, 1632–1677, in his *Tractatus Theologico-Politicus*, rather endeavoured, as otherwise, to undermine the law of nations, as well as the law of nature.

#### SECTION FIFTH.

*Period from the age of Pufendorff to the age of Wolff and Moser, 1673–1740.*

THE particulars of the life of Pufendorff, (1632–1694,) are almost as generally known, as those of Grotius, and from a similar cause; and need not be here repeated.

The method adopted by Grotius in his work *De Jure Belli et Pacis*, was obviously defective; and Pufendorff appears to have considered himself called upon, and to have undertaken, to remedy this defect, and improve the arrangement. But, although Pufendorff was not only a very learned man, and had also a methodical understanding, he had not the extended views, nor the grasp of intellect, which characterized Grotius. And whatever he may have done, in promoting the study of ethics, or even general private law, or jurisprudence, he certainly did not do much, towards the advancement of the law of nations, properly so called, either natural, or positive and practical.

Grotius, the great expounder of the law of nations, and who also expounded, incidentally, the doctrines of



the law of nature, distinctly separated the two sciences from each other; correctly drew, and marked off the lines of boundary between them; and had, in this doctrine, down to the age of Pufendorff, various followers, who viewed and cultivated the law of nations, as a particular and separate science. But Pufendorff, says Von Ompteda, erroneously held, on this point, that the law of nations is absolutely and solely the law of nature applied to nations; therefore resolved not to assign to the former even a particular place or position, in the formation or construction of the latter; and denied it any title to constitute a separate science. The consequence was, continues Von Ompteda, that the science of international law, scarcely beginning to blossom, through the exertions of Grotius and others, was nipped in the bud, withered and decayed. And such continued to be its destiny, till towards the middle of the last century.

Of the works of Pufendorff, connected with the subject of our inquiries, there are three; his *Elementa Jurisprudentiæ Universalis*, his great work *de Jure Naturæ et Gentium*, and his treatise *de Officio Hominis et Civis*. The first, published in 1660, was the work of his youth; but in it, he proved himself to be already a man of great learning, and sketched an outline of the law of nature, which is deservedly considered the first good and useful elementary book of the kind. In this work, Pufendorff gives by anticipation his views of the law of nations; which, says Von Ompteda, proceed on the footing of the law of nations being comprehended in the general law of nature, and requiring no particular study or cultivation. But,

according to this theory, continues Von Ompteda, there is no *jus gentium voluntarium*, in the proper sense of these terms, no positive or practical law of nations; those customs and usages, which nations generally observe in carrying on war, imply nothing obligatory; the neglect or omission of them involves no infringement of any properly legal obligation, but amount at most only to a little rudeness or coarseness of manners; the inviolability of ambassadors, and other such important privileges are partly deduced from the general law of nature, but partly rest on the mere arbitrary will of the states receiving them, and they may be rejected by the latter at pleasure, without any title on the part of the nation sending the ambassadors to complain of injury or demand reparation.

These doctrines are fully enough expounded in the 24th, 25th, and 26th Sections of the first book of the *Elementa Jurisprudentiæ Universalis*.\* Thus Sect. 24th, “De jure gentium nunc quoque aliquid adden-

\* Sect. 24th. Something is now also to be added concerning the *jus gentium*; which, according to some, is nothing else, than the law of nature, so far as different nations, not united under one supreme power or government, observe it in relation to each other; to whom reciprocally the same duties are to be performed in their own mode, as are prescribed to individuals, by the law of nature; concerning which law of nations, there is no occasion, we should here peculiarly treat; seeing the doctrines we expound respecting the law of nature, and the duties of individuals, may be easily applied to states, and entire nations, which have coalesced into one moral person. Besides, we think, there exists no *jus gentium*, which can be properly designated by such a name. For most of those things, which are referred by the Roman jurisconsults and others, to the law of nations, such as certain things concerning the

dum ; quod quibusdam nihil aliud est, quam jus naturæ, quatenus illud, inter se, summo imperio non connexæ, gentes diversæ observant, queis eadem invicem suo modo officia præstanda, quæ singulis, per jus naturæ præscribuntur. De quo non est, quod hic peculiariter agamus ; cum ea, quæ de jure naturæ, deque officiis singulorum tradimus, facile possunt applicari ad civitates et gentes integras, quæ in unam quoque personam moralem, coaluerunt. Præter isthoc, nullum dari jus gentium arbitramur, quod quidem tali nomine proprie possit designari. Pleraque, enim, quæ apud jurisconsultos Romanos aliosque, ad jus gentium referuntur, puta quædam circa modos acquirendi, contractus, et alia, vel ad jus naturæ pertinent, vel ad jus civile singularum gentium, quod, istis in rebus, cum legibus civilibus, plurimorum populorum coincidit. Ex quibus tamen peculiaris juris species non recte constituitur, quippe cum ista jura gentibus inter se sint

modes of acquiring property, contracts, &c., belong either to the law of nature, or to the civil law of single nations, which in those matters, coincides with the civil positive laws of most states. From these, however, a peculiar species of law is not correctly constituted ; because, although those laws are common to nations among themselves, they do not arise from any convention, or mutual obligation, but from the particular will of individual legislators in single states, and therefore may be changed by one people, without consulting the others, and are often found so changed.

Sect. 25th. Finally, there are usually included under the name of *jus gentium*, those customs among most nations, at least among those, which claim the reputation of superior cultivation and humanity, especially those customs, which, by a certain tacit consent, are observed with regard to war. For after it came to be held to be the greatest honour, among those more civilized nations,

communia, non ex aliquâ conventionē, aut obligationē mutua, sed ex placito peculiari singulorum legislatorum, in singulis civitatibus constituta, quæque adeo ab uno populo, inconsultis aliis, mutari possint, ac sæpe-numero mutata deprehendantur.

Sect. 25th. Solent denique sub nomine juris gentium venire, illæ consuetudines inter plerasque gentes, saltem quæ cultiorum et humaniorum, sibi famam vindicant, potissimum circa bellum, tacito quodam consensu, usurpari solitæ. Postquam enim inter cultiores istas gentes, maximum fuit decus habitum, bello gloriam quærere, i. e. in eo præstantiam suam præ ceteris hominibus ostendere, quod, quis multos homines auderet, et dextrè calleret perdere, ideoque in non necessaria aut injusta bella est procursum; ne ambitionem suam invidiæ nimis exponerent, usurpata omni licentia justi belli, humanitate nonnulla, et quadam magnanimitatis specie, bellorum atrocitatem temperare, plerisque populis est visum. Unde consuetudines circa

to acquire glory in war, that is, to show one's superiority in it, above others, inasmuch as one had the bravery and skill and dexterity, to destroy great numbers of men; and after nations were thus induced to rush into unnecessary and unjust wars, most nations thought it right, that they might not too much expose their ambition to envy, by using all the licence of a just war, to temper and moderate the atrocity of wars generally, by some degree of humanity, and a certain show of magnanimity. Hence, usages, concerning the exemption of certain things, and persons, from warlike force, a limited mode of disabling the enemy, a milder mode of treating prisoners and the like. But, although one, if waging lawful war, should neglect these things, namely, when this can be rightly done by the law of nature, one cannot be said to have thereby contravened any valid obligation, further than being gen-

exemptiones certarum rerum, et personarum, a vi bellicâ, modus nocendi hostium, modus tractandi captivos et similia. Quæ, si quis legitimum gerens bellum, neglexerit, scilicet ubi per jus naturæ recte fieri possunt, nulli obligationi validæ contravenisse dici potest, nisi quod ruditatis vulgo arguitur, quia non ad consuetudinem eorum, queis bellum inter artes liberales nominatur, sese composuerit. Non secus, ac imperitiæ inter gladiatores accusatur, qui alterum non ex formulâ artis, vulneravit. Igitur, si quis justa gerat bella, solo naturæ jure, ea regere potest; nec ullo jure ad istas consuetudines, nisi spontè, ob commodum aliquod suum velit, tenetur. At ei, qui injustis grassatur bellis, istæ vel ideo sunt observandæ, ut qualicunque cum temperamento, injurias inferat. Illi vero operam sane ludunt, qui quid communiter inter gentes, in bello potissimum, usurpari solitum colligunt, eaque de jure gentium licita esse concludunt. Quasi vero, non minus injuste, crudeliter,

erally accused of rudeness, because one had not conformed to the custom of those, who reckon war among the liberal arts; just as among gladiators, one is accused of want of skill, who wounds another not according to the formal rule of the art. Therefore, if any one carries on just wars, he may regulate his warfare by the law of nature alone, and is not bound by any law to observe these customs, unless he chooses to do so of his own accord, and with a view to some advantage. By him, however, who engages in unjust wars, these usages are on this account to be observed, that he may inflict injuries with some moderation. But those truly lose their labours, who collect what is usually practised among nations in common, particularly during war, and conclude, that these things are sanctioned by the law of nations; as if an act was not the less unjust, cruel, or avaricious, because it was found to be often committed by those, whose crimes were unpunished among men, because they had no

avare factum sit, quod sæpe factum deprehenditur ab iis, quæis ideo scelera sua inter homines impune fuerunt, quia superiorem non habebant; quippe ideo vehementer reprehensi non sunt, quod cæteri ab iisdem perpetrando non aberrant. Et sane, si ex crebro gentium usu, jus aliquod peculiare debet constitui, primum utique caput in eo erit de bellis, per solam ambitionem, aut ob adspectum lucri licite gerendis, quibus, apud plerasque gentes, nihil frequentius.

Sect. 26th. Quod vero legatos attinet, qui communiter unum, ex præcipuis juris gentium capitibus, constituunt, illi etiam ad hostes missi, siquidem speciem legatorum, non speculatorum præ se ferant, quamdiu apud eum, ad quem missi sunt, in eundem hostilia non moliuntur, puta proditioes, seditiones et similia excitando, (etsi fors, ordinario modo, per tractatus domini sui commodum, præ alterius, quærant,) ipso naturæ jure, sunt inviolabiles. Cum enim ejusmodi personæ sint

superior, as if they were not to be strongly reprehended, because others did not abstain from perpetrating such deeds. And truly if from the frequent usage of nations, any peculiar law ought to be constituted, the first chapter in it certainly will be, of lawfully carrying on wars, from ambition alone, or with a view to gain; than which, among most nations, nothing is more frequent.

Sect. 26th. With reference to ambassadors, who commonly compose one of the principal chapters of the *jus gentium*, they also, when sent to the enemy, if they indeed have the appearance of ambassadors, not of spies, as long, as, with the sovereign to whom they are sent, they do not attempt hostile measures against him, by exciting treachery, sedition, and the like, (although perhaps, in the ordinary way, they, in negotiating treaties, study the advantage of their own master, more than that of the other party,) are by the very law of nature, inviolable. For, since persons of that descrip-

necessariæ, ad pacem conciliandam, aut servandam, quam ipsam jus naturæ omnibus modis honestis, amplecti jubet, utique intelligitur etiam, idem jus cavisse securitati earum personarum, sine quibus finis ab ipso præceptus, obtineri nequit. At vero quæ alia communiter legatis tribuantur privilegia, iis præsertim, qui magis ad expiscanda alterius reipublicæ secreta, quam ad pacem, constituendam aut servandam, in loco aliquo hærent, puta, quod eorum bona non debeant pignore capi, ob eorundem debita, et similia; illa ex merâ ejus ad quem mittuntur, gratiâ et indulgentiâ pendent; quæ, si commodum videatur, citra violationem ullius juris, denegari potest, nisi quatenus aliquid est dandum, respectui, quod ipsius legati apud alium, simili modo tractati fuerint.

In consequence of the approbation which his *Elementa* met with, Pufendorff in 1672, presented to the public an ample system of natural law, under the title of *De Jure Naturæ et Gentium libri octo*. But, while this

tion, are necessary to conciliate or preserve peace, which the law of nature itself directs to be embraced by all honourable means, it is certainly understood also, that the same law has provided for the security of their persons, without which, the end commanded by itself, cannot be obtained. But the other privileges, which are commonly attributed to ambassadors, particularly to those, who are resident at any station, more for expiscating the secrets of the other state, than for establishing or preserving peace, namely, that their effects ought not to be taken in pledge on account of their debts, and the like: these depend upon the mere favour and indulgence of the sovereign, to whom the ministers are sent, and may, if it appear convenient, be denied, without the violation of any law; unless so far as some weight is to be given to the consideration, that his own ambassadors at other courts, may have been treated in a similar manner.

is an elaborate, complete, and even at this day, an excellent work, so far as regards the general law of nature, and has justly formed an era in the history of that law, it nevertheless contributed very little towards the advancement of the science of the law of nations; and, in reference to the latter, contains in reality nothing farther than the *Elementa*, which preceded it. For in Lib. ii. cap. iii. § 23, Pufendorff merely repeats verbatim, the doctrines previously quoted from his *Elementa*, and supports them by some examples of little moment. At the end, he slightly touches the *jus gentium pactitium*; and holds it, also, to be undiscernible, or without foundation, because such treaties, being binding merely for each occasion, upon the contracting parties, are subject to many vicissitudes; and the narration of them, therefore, belongs more to history, than to the law of nations. “Et quod, non nemo ad jus gentium quoque referri instituit, peculiaria conventa duorum pluriumve populorum, fœderibus, et pacificationibus definiri solita, id nobis plane incongruum videtur. Et si, enim, illis stare, lex naturalis de servandâ fide jubet, legum tamen et juris vocabulo, valde improprie veniunt. Et præterea infinita, ac magnam partem temporaria sunt. Quin nec magis partem juris constituunt, quam pacta singulorum civium inter se, ad corpus juris civilis spectant; cum potius historia sibi eadem vindicet.” Farther, while he devotes particular chapters to the subjects, *De Jure Belli et Pacis*, *de Pactis Bellicis*, *De Pactis pacem reducentibus*, and *De Fœderibus*, Pufendorff omits entirely the subject of ambassadors.

From the preceding examination, it appears, that



instead of promoting, Pufendorff, by his theory rather obstructed and impeded the progress of international law properly so called, whether natural, or positive and practical. He did not clearly perceive the distinction between justice and the other virtues, as being susceptible of enforcement; and confounds ethics or morality, with legality. By holding the law of nations to be nothing but the law of nature, he applied the same rules to nations, as to individuals; although the juridical or legal relations of these personages to each other, are, from the very nature of their constitution, materially different. And he overlooked, or neglected, the power of different classes of nations, who maintain a close intercourse with each other, to form a positive and practical set of regulations for themselves, either virtually, by long observed customs and usages, or by express convention.

In consequence, however, of the great fame and renown, which Pufendorff acquired from his learning, and particularly from his work *De Jure Naturæ et Gentium*, the opinion which he had expressed in it, of the law of nations, found a general reception, and became the opinion of the majority of the learned. At the same time, there were not wanting, during that period, individuals, who entertained doubts of the correctness of that opinion, and ascribed to the law of nations a wider range, and greater importance, holding that law to be a distinct science.

“Grotius, observes M. Schmalz,\* so celebrated as the father of the general law of nations, was not so success-

\* Europäischen Völkerrecht Buch I. S. 25, 26.

ful in founding the positive international law of his age. Although, besides the law, which God and nature have prescribed, he recognised also a law among nations, introduced through custom and usage, and tacit consent, Grotius, nevertheless, cited and adduced what had passed among nations, only as examples, illustrative of the theory, not as facts founding or establishing the law; and he uniformly selected his examples from antiquity, and thus guarded himself against the suspicion of alluding to the events of his own times."

"Pufendorff, on the contrary, continues M. Schmalz, and his numerous followers, expounded the law of nations entirely from the law of nature. Their law of nature, and their law of nations were, therefore, synonymous terms. The men of the world lauded the acuteness and the learning of the schoolmen, and derided their rules."

"As no nation, continues M. Schmalz, has contributed more than the Germans, towards the formation of the sciences, and the completion of systems, so it was a German, who, in opposition to Pufendorff, first gave a definite idea of a positive law of nations. Samuel Rachel, 1628-1691, first a professor in two universities, and afterwards the ambassador of Holstein at the congress of Nimeguen, was thereby the more easily led to the recognition of the reality of a law, which, established among nations, through conventions, express, or tacit, binds them to each other, for the sake of their mutual or reciprocal advantage. He carefully distinguishes also the treaties of single or individual nations, from the general and common law

of nations, which rests only upon, or only consists in, custom and usage."

Soon after the appearance of Pufendorff's great work, Rachel published a treatise in 1676, entitled *De Jure Naturæ et Gentium Dissertationes Duæ*; which contain an outline of the law of nature, and of the law of nations; and particularly, with reference to the last, and in opposition to Pufendorff, a pretty accurate description and discrimination of the two sciences, and of the boundaries which separate them. He gives a very correct notion of the natural law of nations, as adapted to the different stages of civilization, and likewise of the customary and conventional law of nations; and, in particular, after Zouch, is the first who makes mention of the last of these, as *jus pactitium*. Farther, he rendered essential service inasmuch, as he showed these different kinds of the law of nations, to possess the properties and dignity of a science, and in this respect, first improved upon the views of Grotius.

After Rachel had thus explained so fully, his views on the subject, in opposition to Pufendorff, there arose two parties, of which, with regard to the proper conception of the science of the law of nations, the one agreed with the former, the other with the latter. Pufendorff had, no doubt, the greatest number on his side. To this, however, Von Ompteda observes, the correctness of his opinion contributed much less, than the blind deference which was paid to him, through the celebrity of his name; and adds, that this is the less wonderful, when it is remembered, that in these times, it was much more usual, than in later periods,

*jurare in verba magistri.* But Rachel had also his followers. And as about that time, it became an almost fashionable literary occupation in Germany, to investigate the constitution of the law of nature and nations, and the distinction between the two, most learned men treated of the subject, not entirely in complete works, but partly in small dissertations, partly incidentally in greater works, which were devoted to other sciences, especially to the Roman law.

Of these different German writers of minor treatises, and incidental discussions, referring to Von Ompteda, we shall merely mention the names of Durr, Uffelmann, Pompeius, Zentgrav, Werlhof, and Von Ludewig; and notice the opinion of the great Leibnitz, on the point now under consideration. In 1693, he prefixed an ample preface to his *Codex Juris Gentium Diplomaticus*, in which he distinctly enough explains his understanding of international law, as partly natural, partly arising from obligatory usages, and from the treaties of nations. “Præter, æterna naturæ rationalis jura, ex divino fonte fluentia, jus etiam voluntarium habetur receptum moribus, vel a superiore constitutum. Et in republica, quidem, jus civile ab eo vim accipit, qui summam potestatem habet; extra rempublicam, vel inter eos, qui summæ potestatis participes sunt, locus est juri gentium voluntario, tacito populorum consensu recepto. Neque vero necesse est, ut sit omnium gentium, vel omnium temporum, cum in multis arbitror, aliud Indis, aliud Europæis, placere, et apud nos ipsos, sæculorum decursu, mutari, quod vel hoc ipsum opus indicare potest. Basis igitur, juris fecialis inter gentes,

ipsum naturæ jus est. Huic gentium placita inædificata, sunt variabilia, temporibus locisque.”

Beside the minor treatises and incidental discussions just referred to, the period from 1673, to 1740, produced also in Germany a few larger works on international law, of whose authors it may be proper to take some notice. In 1680, Wolfgang Textor went further than Rachel, and maintained that the law of nations may be treated as a proper, exact, separate, and independent science. It does not appear, however, that Textor had very distinct ideas of the proper range or sphere, foundation, and object of the law of nations; and his work contains too much of the internal public, or constitutional law of states, and an unnecessary mixture of the Roman law.

Hitherto different learned men in Germany, had exerted themselves to controvert and refute the opinion of Pufendorff, as to the non-existence of a law of nations, distinct from the law of nature, and had ascribed to it the properties of a particular science. And it is probable they would have found more followers, and would have rendered their opinion, even at that time prevalent, had not a zealous adherent of Pufendorff then appeared. In 1688, Christian Thomasius published his *Institutiones Jurisprudentiæ Divinæ*, and in 1718, his *Fundamenta Juris Naturæ et Gentium, ex sensu Communi deducta*; and by his learning, and the great reputation he had acquired, frustrated all the endeavours just alluded to, and rendered his view of the law of nations, which coincided with that of Pufendorff, triumphant throughout Germany.

From the time of Thomasius, for a pretty long period, the expressions, *jus naturæ* and *jus gentium*, were held in Germany as almost synonymous, and were used, partly in connexion, partly also as each denoting something particular. And one must always keep this in view, to avoid being misled, in expecting to find in the works which appeared in these times, and are superscribed, some of them, *De Jure Naturæ et Gentium*, others *De Jure Gentium* alone, anything else, than mere treatises on natural law. Of this description are the works of Müller, Mollenbec, Hombergh, Schneider, which appeared towards the end of the seventeenth, and during the first half of the last century. These authors very seldom devote even a chapter to the natural law of nations, and the first work, in which this is done, and which therefore deserves particular mention here, is the well-written compendium of Griebner, entitled, *Principia Jurisprudentiæ Naturalis*, published in 1710. Of this work, the whole of the third book treats, de jure gentium in genere, de statu naturali gentium, inter se, &c.; embraces the whole range of the law of nations; and is executed in a superior manner.

About this time, 1723, appeared the work of the, in Germany, well-known writer, Glasfey, entitled, *Vernunft und Völkerrecht*. The important services rendered by this author to the science of the law of nations, in particular, cannot be disputed. He treats of it with considerable fulness in the third book of the work just mentioned. And the superior excellence of his work over the other writers of these times, consists in the greater part of the doctrines being

illustrated by well-chosen examples from more recent times, and discussed in a practical manner. On the other hand, the defect of the work is, the awkward prolix style, and the interruptions created by many tedious digressions. In 1746, in the third edition of this work, Glafey separated the law of reason from the law of nations; and in 1752, republished the latter, greatly improved, with the addition of a chapter on treaties. Farther, Glafey had very correct ideas of the voluntary or positive law of nations; and ably defended it against those who denied its existence.

About this time also, Henry Köhler rendered good service, in the cultivation of the law of nations, in his work published in 1735, entitled, *Juris Socialis et Gentium, ad Jus Naturæ revocati, Specimina*. He had in his former work, *Exercitationes Juris Naturalis*, 1729, very ably treated of the general law of nations, and on solid grounds; and he now presented in this social law of nature, general state or constitutional law, and natural international law. The last, in particular, occupies the entire seventh specimen. Here the principles of the law of nations are treated with uncommon precision and perspicuity. And the author can only be charged with one failing, that of incompleteness, in omitting several important subjects, such as national intercourse in peace, and ambassadors.

Finally there appeared in Germany, about the same time (1736), a compendious introduction to the law of nature and nations by Reinhard, which deserves notice, as being an excellent specimen of the cultivation of the subject, illustrating the condition and obligations of nations, in relation to each other.

Beside the preceding writers, who treated of the law of nations, incidentally, under the general law of nature, there occurred within this period, two or three learned men, who combined it with other kindred sciences, namely with constitutional law, and the private law of princes. In the year 1735, Sigismund Stopf wrote a work entitled, *Jus Naturæ et Gentium in duos divisum tractatus*; the last a mere commentary on Grotius; the first, which was to treat of *Jus publicum universale*, is also devoted, in part, to the law of nations. The author proposes a not incorrect definition of the law of nations, and denominates it, "jus quod inter plures gentes, quâ tales, cum mutuâ obligatione, receptum est." In the farther description of its nature and qualities, he falls into the error of excluding from it, the precepts, or principles of the natural law of nations, and of confining it solely to consuetudinary and conventional law. In the execution, however, this is not perceptible; the discussion relating much more to natural, than to positive law.

Among the cultivators in these times of the law of nations, in Germany, in connexion with other kindred sciences, we must mention the learned and industrious Burchard Gotthelf Struve, who laboured thirty years long, at a *Corpus Juris Gentium*, which was to embrace the united law of nations, particularly the consuetudinary and conventional law of nations, along with the general public or constitutional law of states, and the private law of princes. But he did not live to complete it; and although part of it was published after his death, the part which embraced the law of nations, and of which the value was heightened by the



subject being treated in a new and entirely practical manner, and supported by apposite examples from recent history, remained in manuscript in 1785, inaccessible to the public.

Having hitherto noticed the most important writings, which, in the first half of the last century, down to the age of the great Wolff, treated of the law of nations, partly in connexion with the law of nature, partly in connexion with other nearly allied sciences, we should now, of course, come to those writings, in which the law of nations has been discussed wholly, peculiarly, and solely with reference to itself, without any mixture. But of such, it must be confessed, this period produced none, except only the compendium of the learned Von Ichstadt, (1702-1776) which he published in 1740, under the title of *Elementa Juris Gentium*. This work is composed in the stiff and dry mathematical style, which Ichstadt too rigidly, and almost pedantically followed; and is therefore by no means attractive to readers. But the doctrines propounded are appropriately arranged; and the sphere, and the principal component parts of the science of the law of nations are correctly determined. From the contents of his work, it appears, he treats not only of the natural, but also of the positive law of nations, under which he quite correctly comprehends the conventional and consuetudinary law of nations; but might well have omitted the ceremonial law, as constituting a third subdivision of the positive law of nations. He, no doubt, devotes to the natural law of nations, the chief part of his work, and despatches the positive in the sixth book, very briefly. But in his preface, he

apologizes for this ; and intimates he had intended to give in this book, likewise, a short abridgment of the conventions of nations, treaties of peace, leagues, pretensions of courts, and international customs and observances.

To this period also, in point of time, yet so far anticipating the improvement of the succeeding period in the development of the practical law of nations, belong the *Quæstiones Juris Publici* of Van Bynkershoek, published in 1737, and afterwards in 1752. In this work, this very able Dutch lawyer and statesman, (1663–1743) did not propound any system of international law ; but he embraced many of its most important doctrines, particularly those of embassies, and of the maritime law of nations ; of which last mentioned part of the treatise, we shall reserve our notice for a more detailed historical view of that department of the science.

Such are the principal works on international law which have appeared during the period we are now considering. They treat, it will be observed, almost solely of the natural law of nations. And it was reserved for the following more recent period, to give the form of a science to the positive law of nations. It was not, M. Schmalz remarks, till after the peace of Westphalia, that sufficient materials were accumulated for constructing the edifice of this science. Few of the learned then knew, what principles the European governments followed, or how they applied them. But from that time, the increase in the number, and frequency of public journals, memoirs and other periodical works, announcing in detail, public transactions and events, in peace and in war, excited and diffused a more general

interest in political and international affairs, and raised questions of right, of legality and illegality. The attention of nations came thus to be more directed to the principles of law, to what were recognised, and to what were denied or rejected. And the great step which was taken, during the period we have been contemplating, towards the formation of the science of positive international law, was the commencement and progress made in the accumulation of the materials, which constitute an important branch of that law. For we have to thank that age, for the large collections of national conventions, treaties of peace, leagues, state papers, and written records in general, which serve as the foundation of the *jus gentium pactitium*. These are manifestly too important to be left unnoticed ; but, of course, such notice should embrace, not those collections, which contain merely the public records of particular states, relative to their internal institutions, but only those of a more general description, which are not confined to any particular nations, or periods, and are entirely international.

The first who thought of forming such a complete collection, in Germany, was Daniel Von Nessel, the imperial librarian at Vienna, who in 1690, announced a work of this description ; but did not live to finish it. Soon after this, the great Leibnitz undertook a somewhat similar work, and published it in 1695, under the title of *Codex Juris Gentium Diplomaticus* ; which he enlarged in 1700, with a second part, under the title of *Mantissa Codicis Juris Gentium Diplomatici*. Not only does this work deserve high estimation, even at this day, as the first attempt or experiment

of the kind, which succeeded, but also because it contains many valuable and useful documents, of the law of nations from the eleventh to the sixteenth century. At the same time, that it is far from complete, appears even from both parts together forming only one moderate folio volume, and extending only to the sixteenth century; while the second part contains not only records, properly belonging to international law, but also many other pieces beyond its limits, such as ecclesiastical ordinances, treaties, and testaments of great lords, and statutes.

Far more complete than the *Mantissa* of Leibnitz, was the work, which almost at the same time, appeared in 1700, at Amsterdam, in four vols. folio; entitled, *Recueil de Traités de Paix, &c.* For this work, next to the publishers who undertook the printing, (a company of booksellers at Amsterdam and the Hague,) the public are indebted chiefly to Jacob Bernard, originally a Protestant preacher in France, and afterwards professor of philosophy at Leyden; and it was much appreciated, before the publication of the more complete work of Dumont. Soon after the collection of Bernard appeared, the industrious German lawyer, Burchard Gothelf Struve, in 1717, announced like Nessel, his intention of publishing a complete edition of public records; but he did not accomplish this work, any more than his *Corpus Juris Gentium*, before mentioned.

Next appeared the great work of Dumont, *Corps Universel Diplomatique du Droit des Gens*, which was published at Amsterdam, in 8 vols. folio, during the years 1726–1731; and was afterwards enlarged in

1739, by Barbeyrac and Rousset, with a supplement of 5 folio vols. This work of Dumont was far more complete, than any of the preceding, and still holds the first rank among all collections of this description.

In 1730, Schmauss published under the title of *Corpus Juris Gentium Academicum*, a collection of international treaties, during the two preceding centuries; a much shorter work than the last, but for ordinary use, the more convenient; and thereby rendered no common service to the study of positive international law.

There is still a work, very useful in the practical law of nations, serving as a convenient survey or review of all its records, which does honour to the period of the progress of the law of nations, we are now contemplating; namely, *Georgisch Regesta Chronologico-Diplomatica*. In the first three parts of this incredibly laborious work, are specified all public documents of all kinds, which have appeared, from the year of the Christian era, 314, to the year 1730, in chronological order, with an account of the authors, by which any one of them may be found. In the fourth part, these documents and records are arranged in alphabetical order, according to the persons and subjects, to whom, or to which, they relate. Nothing, observed Von Ompteda, in 1785, was more to be wished, for the study of the practical law of nations, than that the important records in this department, which in the collection of *Georgisch*, are almost buried and lost among the prodigious crowd of others, which belong to the constitutional law of states, to the canon law, and to the private law of sovereigns, should be selected,

and that there should thence be formed a specification or catalogue, such as to be continued to the present times. Such a work, we shall see, appears to have been subsequently realized by Von Martens.

#### SECTION SIXTH.

*Period from the age of Wolff and Moser, to the age of Von Ompteda and Von Martens, from 1740, to 1785-1790.*

WE come now to a later and more important period in the history of the science of the law of nations. During this period, the science came to be cultivated in two different ways. Some jurists made choice of the mere natural law of nations, as in the preceding period, for the object of their study; and we shall see, that this science was cultivated by them in a manner, superior to what was formerly practised. On the other hand, other jurists began to contemplate the law of nations in another point of view, almost entirely new, namely, in a practical point of view, hitherto almost entirely neglected, and to write upon it, under the denomination of the European or practical law of nations. We shall separate from each other, and consider apart, these two classes of authors; of the former of whom the philosopher Wolff, and of the latter of whom, the learned jurist Moser, were the leaders.

## SUB-SECTION I.

*Natural Law of Nations.*

AMONG the writers of last century on the natural law of nations, Christian Baron Von Wolff is pre-eminent. The uncommon services, which this German philosopher rendered to all the departments of philosophy, are notorious. And so important a science, as the natural law of nations, did not escape his attention. In 1740-1748, he composed and published a system of the law of nature, in eight large volumes; in the last of which, he also embraced the general constitutional law of states. After he had completed this work, he devoted his attention likewise to the law of nations. And in 1749, in the 70th year of his age, he composed the systematic work, entitled, *Jus Gentium, Methodo Scientificâ pertractatum, in quo Jus Gentium Naturale ab eo, quod Voluntarii, Pactitii, et Consuetudinarii, est, accuratè distinguitur*. This is a complete separate and independent work; although, of course, if one chooses, it may be viewed, as the ninth part of the great system of the law of nature just mentioned.

The title itself shows, that Wolff distinguished the law of nations into the “jus gentium naturale, voluntarium, pactitium et consuetudinarium.” And as he indisputably marks these distinctions with greater accuracy than his predecessors, it may be worth while, with reference to this division of the law of nations into

four different kinds, to inquire, what Wolff understood by the *jus gentium voluntarium*, in so far as he contradistinguishes it from the *jus pactitium et consuetudinarium*. On that point, he at the outset expresses himself thus:—"Quemadmodum ea est hominum conditio, ut in civitate rigori juris naturæ per omnia ex asse satisfieri non possit, ac propterea legibus positivis opus sit, quæ neque in totum a naturali jure recedunt, nec per omnia ei serviunt, ita similiter gentium ea est conditio, ut rigori juris gentium naturalis per omnia ex asse satisfieri nequeat; atque ideo jus istud in se immutabile tantisper immutandum sit, ut neque in totum, a naturali recedat, nec per omnia ei serviat. Quoniam, vero, hanc ipsam immutationem, ipsa gentium communis salus exigit, ideo, quod inde prodit jus, non minus gentes inter se admittere tenentur, quam ad juris naturalis observantiam naturaliter obligantur; et non minus illud, quam hoc, salvâ juris consonantiâ, pro jure omnium gentium communi, habendum. Hoc ipsum autem jus cum Grotio, quamvis significatu non prorsus eodem, sed paulo strictiori, jus gentium voluntarium appellare libuit." Amid all this circumstantial illustration, there still remains a doubt, what more proximate determination of the law of nations, Wolff understood by the *jus gentium voluntarium*. This, however, becomes more clear, when he further explains, that the *jus voluntarium* has for its foundation, the presumed consent; the *jus pactitium*, the express consent; and the *jus consuetudinarium*, the tacit consent of nations. And his view of the subject is thus succinctly stated in the compendium of his large work, which, after its completion, he published under the title of



*Institutiones Juris Naturæ et Gentium*, Part IV. Cap. I. § 1090. “Cum gentes, conjunctis viribus, se statumque suum perficere obligantur, ipsa natura societatem quandam inter gentes instituit, in quam, ob obligationis naturalis indispensabilem necessitatem, consentire tenentur, ut quasi pacto contracta, videatur. Atque hæc societas communis, salutis causâ, inter gentes instituta, civitas maxima vocatur; cujus membra, seu veluti cives, sunt singulæ gentes. Atque hinc nascitur jus quoddam universis competens in singulas, quod imperium universale, sive gentium, appellari potest; nimirum determinandi actiones singularum salutis communis obtinendæ causâ, et cogendi singulas, ut obligationi suæ satisfaciant. Cumque omnis societas suas habere debeat leges, quibus determinantur ea, quæ salutis communis causâ semper eodem modo, fieri debent; civitas quoque maxima, leges habere debet. Quemadmodum, vero, lex naturæ præstat consensum in civitatem maximam; ita eadem quoque eundem supplet, in condendis legibus. Sicuti, enim, in qualibet civitate, leges civiles ex naturalibus condendæ, et ipsa lex naturæ præscribit modum, quo id fieri debet; ita, quoque, ex legibus naturalibus, fieri debent leges civiles in civitate maximâ, eodem modo, quo in civitate qualibet particulari, juxta theoriam, lege naturali præscriptam. Atque hoc jus, quod ex notione civitatis maximæ derivatur, cum Grotio, dicimus jus gentium voluntarium.”

The Wolfian *jus gentium voluntarium*; thus, appears, to be nothing else, than that, to which Von Ompteda afterwards gave the name of the modified natural law of nations. And it is to be regretted,

Wolff did not explain more fully, the proper nature of this kind of law, and illustrate it by examples. For the source, from which he derives his so called voluntary law of nations, has rendered it a stumbling-block to his followers, and will not stand the test of strict investigation. As we have just seen, he founds the obligatory nature of the *jus gentium voluntarium*, on an universal republic of nations, *civitas gentium maxima*; and argues thus, nature itself has established a certain society among nations; and binds them to enter into, and to maintain it. The ground and the object of this social bond are, reciprocal aid, the melioration of their respective conditions, and the advancement of the general or universal welfare. Hence he argues, it is to be assumed, that all nations have, for their common welfare, entered into an all embracing society, *civitas gentium maxima*, in which each people represents a person, or member of the society. Now, as each community, or state, must have its laws for promoting or securing the public welfare, so must also the universal republic of nations have a right, to establish similar laws. All nations are subject to these laws; having by their entrance into society with each other, as members of the universal society, bound themselves reciprocally, to allow each other to enjoy the protection of these laws. Hence arise their reciprocal rights, capable of being enforced. Proleg. § 7-21.

But this argument will not bear investigation; and it must be admitted, that, as other philosophers have erred in founding their theories of natural law, upon a fictitious state of nature, in which mankind have never

been found to exist, so Wolff erred in founding his theory of voluntary international law, upon an imaginary universal republic of nations, and allowed himself to be misled, by his excessive desire to demonstrate everything.

Observation, and experience, the recorded annals of mankind, afford no evidence of any such universal association among nations, but the reverse. There has not been, and in all probability never will be, discovered in the laws of nature, any sufficient ground for a compulsory obligation on all nations to unite in society with each other. The superstructure, therefore, which Wolff has reared upon that position, falls to the ground. He was not, however, as Von Ompteda observes, far from the object he aimed at; and might have arrived at it by a shorter road. Nations certainly, notwithstanding the strong feeling, and urgent pressure of their own manifold respective wants, are not legally bound, and cannot be justly compelled, to unite themselves in society with each other, or even to hold reciprocal intercourse, commercial, or otherwise. But they can do so if they choose. This, however, they cannot do, otherwise, than by submitting to the rules, under which this reciprocal intercourse, whether commercial or otherwise, is carried on among nations. And according to the degree of advancement in civilization, attained by those different nations, these rules may be extensions, or modifications, of those international rules, which are found applicable to a less cultivated state of mankind. Instead, then, of imagining, or introducing into discussion, a universal republic of nations, reared as it were, by force of natural law,

and anxiously seeking to demonstrate the obligation of nations to enter into such a society, Wolff, proceeding upon actual observation and experience, might have reasoned thus. Nations, as such, as independent communities, in relation to each other, are not, either originally, or subsequently, legally bound, and cannot, in justice be compelled, to enter into any social connexion with each other. But the differences in the countries occupied by different nations, in point of climate, soil, and capacity of production, the different degrees of civilization introduced in time, among most of them, and the thence arising manifold wants, of which the supply or gratification is to be sought externally or from abroad, have created for such nations, a very strong and urgent inducement, approaching to a kind of necessity, to commence and carry on an almost constant exchange of commodities, natural and artificial, and to maintain commercial intercourse with each other. And this intercourse cannot otherwise take place, than under the observance of the rules of reciprocity, which the civilization of nations introduces, and in a manner prescribes, and by which it sets limits, sometimes wider, sometimes narrower, to the original, or more properly speaking, earlier natural law of nations, namely, to that collection of international rules, which were found applicable to nations in a less cultivated state. Had he taken this view, Wolff would not have exposed himself to the censure justly bestowed upon his imaginary republic of nations. And it seems thus sufficiently established, that he erred, not so much, in supposing a species or modification of the law of nations, which had no existence, as

in attempting, by a fiction, to deduce from an abstract legal duty, what is to be deduced from a sort of physical necessity in the destined progress of nations.\*

With regard to the contents of his work, Wolff methodically and succinctly arranges the whole of the natural law of nations, under the following chapters:—

Cap. I. De Officiis Gentium erga seipsas ac inde nascentibus juribus.

Cap. II. De Officiis Gentium erga se invicem, ac inde nascentibus juribus.

Cap. III. De Dominio Gentium, et juribus cum eodem connexis.

Cap. IV. De foederibus et aliis Pactionibus Gentium ac sponsionibus.

Cap. V. De Modo componendi Controversias Gentium.

Cap. VI. De Jure Belli Gentium.

Cap. VII. De Jure Gentium in Bello.

Cap. VIII. De Pace et Pactione Pacis.

Cap. IX. De Jure Legationum.

Under these divisions, placed in becoming order, all is treated thoroughly and profoundly; and, with one exception, while nothing properly belonging to international law is omitted, nothing foreign to the subject, is mingled with it. The exception here alluded to, is in the first chapter, in which there are to be found a good many doctrines which belong not to international law, but to the general constitutional law of states, and which each state forms for itself. Indeed it is a great failing in Wolff, that he is so much disposed to demonstrate

\* Von Ompteda, Literatur, § 94.

moral duties, as legal obligations. Thus the duty of a people to promote their own perfection or prosperity, the internal means, which are to be employed for that purpose, the duties of individual citizens to contribute to the attainment of that end, in general, as well as in particular departments, the internal trade of a state, the subjects of *res universitatis et res publicæ*, of the love of native country, of banishment, and such others, all belong not to the law of nations, and yet are treated rather diffusely in the first chapter. But these small defects must be overlooked in a work otherwise so excellent; and Wolff will always hold one of the most distinguished places among the learned in the natural law of nations. Indeed he has been, with justice, represented as a second Grotius. Grotius first raised that law to the dignity of a science; Wolff first gave it lucid arrangement, and moulded and digested it into a system.

In 1750, Kahrels published a compendium of the law of nations; but it is written in a very peculiar taste and style, which was not likely to meet with general approbation; and it is inferior to the other elementary treatises for teaching.

In 1752, appeared the *Volkerrecht* of Glafey, or rather the enlarged and improved edition of that part of the law of Reason, already published by Glafey in 1723, which treats of the law of nations, and was formerly noticed.

Next in the order of time, there appeared in France, the work of De Real, entitled *La Science du Gouvernement*, consisting of eight books, of which the fifth contains, "Le droit des gens, qui traite des ambassades,

de la guerre, des traités, des titres, des prerogatives, des pretensions, et des droits respectifs des souverains." In his introduction, the author conveys pretty correct ideas of the law of nations, and of its different parts, natural, consuetudinary, and conventional; and arranges these different kinds uncommonly well, in relation to each other. In the execution of the work itself, the chapter on embassies is the most ample and rich, and surpasses all the others in completeness. The second chapter on war, is in proportion much shorter, and also the third chapter on the treaties of nations. In the fourth chapter the different subjects, of the rank of nations and states, of their reciprocal pretensions, of prescription among nations, and of the titles of sovereigns, and their origin, are all combined. A review, however, of even the mere contents of this work, shows that, as a whole, it is defective and incomplete; inasmuch as different subjects of the law of nations, such as the rights and obligations of nations, with regard to their territory and property, their dominion over the sea, their commercial intercourse, &c., are passed over in silence. But the subjects actually treated, are well discussed; and in particular, so practically, that it seems doubtful, whether the book should be reckoned among the theoretical, or practical works, on the law of nations. Unfortunately, however, the author throughout indicates an excessive predilection for his own native country, which frequently leads him to erroneous and extravagant conclusions.

About the same time, in England, 1754 or 1756, Dr Rutherford published his *Institutes of Natural Law*, being the substance of a course of lectures

delivered by him in St John's college, Cambridge, on Grotius, *De Jure Belli et Pacis*. And in this commentary, the author exhibits great acuteness and sound argument, as well as learning. But in his first volume, he explains merely the "Rights and Obligations of Mankind considered as individuals." And the second volume, in which he professes to explain "The Rights and Obligations of Mankind, considered as Members of Civil Societies," is entirely devoted to the internal private law, and public or constitutional law of states; except chapter ix., which treats of the law of nations, at some length; and contains a good deal of valuable doctrine, with the exception of the erroneous argument, that no evidence of a positive law of nations is to be collected from usage, contrary to the opinion, not only of Grotius and Leibnitz, but also of the latest and ablest writers on international law.

Next appeared in the year 1758, a work, which has become one of the most popular and celebrated on the law of nations, namely that of Vattel, entitled, "*Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la conduite, et aux affaires des Nations, et des Souverains.*" Vattel himself acknowledges in his preface, that his work is a mere recast, or improved edition of the great work of Wolff on the law of nations, which he has endeavoured to clothe in a lighter and more agreeable dress. And in fact this is obvious from a comparison of the two works. Nay the contents of his work show, that Vattel has even adhered in the strictest manner to the order of the Wolffian system; and from the following conspectus of the two works prepared by Von Ompteda, it is plain, the chapters of



Wolff, and the books and chapters of Vattel, uniformly correspond with each other.

WOLFF.			VATTEL.
Chap. I.	-	-	Book I.
Chap. II.	-	-	Book II. Chap. I—V.
Chap. III.	-	-	Book II. VII—XI.
Chap. IV.	-	-	XII—XVII.
Chap. V.	-	-	XVIII.
Chap. VI.	-	-	Book III. Chap. I, II.
Chap. VII.	-	-	III—XVIII.
Chap. VIII.	-	-	Book IV. Chap. I—IV.
Chap. IX.	-	-	V—IX.

It also appears, that, in the execution of the work, Vattel carefully followed not only the general arrangement, but even the train of thought of Wolff, with some occasional variations. He wisely, however, rejected the views of Wolff with regard to his imaginary universal republic of nations, and contested some other opinions of Wolff, though not always with equal success. But beyond dispute, the greatest service rendered by Vattel to the science of the law of nations, consisted in his having clothed in a natural, easy, and agreeable dress, the propositions which Wolff had delivered in a dry mathematical style. And the consequence was, that even during the period we are now considering, his book became almost the only one treating of the natural law of nations, which suited the convenience of statesmen, and of such persons as do not particularly devote themselves to profound erudition. With all its merits, however, this work of Vattel has also its defects. We desiderate in it, a correct separation and discrimination of the law of nations, from the general con-

stitutional internal law of states. If Wolff mingled different doctrines of the latter with his *jus gentium*, in the first chapter, which treats “de officiis gentium erga seipsas, et inde nascentibus juribus,” Vattel goes still farther, and in his first book, *De la nation considérée en elle-même* (which forms the third part of his whole work, and in the editions of it, which are divided into three parts, occupies the whole first part,) he discusses almost the whole general internal law of states; in which, as he admits in his preface, he derives the most of his propositions from the separate work of Wolff on that internal law. It cannot be denied, too, that Vattel is frequently superficial, and does not penetrate deeply into his subject. And it is much to be regretted, that, for the most part, he does not go beyond the exposition of the general doctrines of the law of nations, and does not endeavour to support and illustrate them by precedents and proofs from history, particularly modern; of which De Real had set him an example. Had Vattel made this important addition to his work, and thereby rendered it more practical, it would have been productive of much greater benefit, and would have been still more in the hands of those, on whom the actual administration of the law of nations depends.

After Vattel, some time elapsed, before any farther cultivation of the law of nations took place. But in 1768, the able professor Schrodts of Prague, who had formerly written a *Systema juris publici universalis*, published also a *Systema juris gentium*. Schrodts does not recognise any voluntary law of nations, consuetudinary or conventional; he objects, with justice, to

Wolff's theory of a general republic of nations; and he derives all, that proceeds, in the commercial intercourse of nations, upon the fundamental principles of the general natural law of nations, merely from rules of convenience and expediency. He next divides the law of nations into absolute and hypothetical; and the former again into that, which comprehends perfect or compulsory obligations, and that which includes merely imperfect obligations. Under the hypothetical, he comprehends the law of war and of peace, under which last he includes the law of embassies. The treatise corresponds exactly to the idea of an academical elementary book for lecturing upon; dry and uninviting, and in no way rendered interesting by examples; which especially if taken from modern history, constitute, as Von Ompteda observes, the zest, the great excellence of the superior works on international law. At the same time, the matters treated are well arranged, are correctly defined, and are generally well expressed.

The next work, in point of time, on our subject is, the *Precis du Droit des Gens* of viscount de Maillardiere, which appeared at Paris, in 1775, but which does not exhibit any particular merit, and is described by Moser, as both theoretical and practical, but as very brief, and as containing very little matter within the range of the law of nations.

Besides the preceding works peculiarly devoted to the law of nations, there were not wanting, during this period, elementary treatises on the law of nature, which at the same time contained, sometimes a short, at other times a more full, but for the most part, a pretty complete account and discussion of the natural law of

nations, separate from the universal law of nature. Indeed, during this period, it gradually became the custom in Germany, for the teachers of natural law, to divide it into the natural law of individual men, and into the social law of nature; and this last again was divided into the *jus naturæ sociale privatum*, into the *jus publicum naturale*, or general constitutional law of states, and into the natural law, which exists between or among whole nations, in relation to each other, or *jus naturale gentium*. And there thus came to be introduced into the text-books, or elementary works on the law of nature, a particular section, which, especially in the latest works of this kind, contains a pretty full and good exposition of international law. Among the writers of this description, may be mentioned Burlamaqui, Martini, Feder, Höpfner; and although not noticed by Von Ompteda, Pestel, in his *Fundamenta Jurisprudentiæ Naturalis*, 1775, and Lumpredi, the third volume of whose *Juris Publici universalis Theoremata*, contains, though not without its defects, a very distinct and neat treatise on the natural law of nations.

## SUB-SECTION II.

### *Positive Law of Nations.*

WE proceed now to investigate the cultivation of the science of the positive law of nations, frequently called the practical law of nations; though rather incorrectly, because the principles of the natural law of nations,

are as frequently applicable in actual practice, as the rules of international law founded on the acts of men—on the consent of nations, as evinced by custom and usage, or expressed in particular treaties.

Leibnitz, we have seen, was the first who collected the various treaties, concluded by states with each other, in order to promote the cultivation of the science of international law,—a useful task, which, we have likewise seen, was afterwards prosecuted and executed with great success, by different Germans and Dutchmen. The materials now collected were abundant; all that was wanting, was to give them a scientific form. This was attempted by the Germans only. Other nations had rather cultivated the law of nature, under the name of the law of nations, or *jus gentium*.

Among the Germans, the first person who directed his attention to this hitherto almost wholly neglected department of the science of the law of nations, and almost for the time the only writer of this description, is the, in Germany, celebrated international jurist, J. J. Moser. In 1732, this individual arrived at the conclusion, that the manifold legal relations, which exist among the European states, and their sovereigns, and are founded partly on express treaty, partly on custom and usage, well deserved to be treated separately, in the form of a proper science. And having commenced the composition of a work devoted to this object; he, in 1732, published the first part of a treatise, entitled, “Anfangsgründe des Wissenschaft von der gegenwärtigen Staatsverfassung von Europa.” In 1736, he published, along with his miscellaneous works, the projet of an introduction to the most recent European

law of nations, in peace and war. But this essay was little more, than a list of the rubrics, which such a work ought to contain. And it was not till 1750, or 1752, that he published his *Grundsätze des jetzt üblichen Europäischen Völkerrechts in Friedenzeiten, und, in Kriegzeiten*.

The author himself admitted that these *Grundsätzen* were deficient in completeness and profundity, and were both written in haste. And it is therefore to be regretted, he did not afterwards think of enlarging, improving, and polishing them. On the contrary, he wrote in 1778, at the desire of the duke of Wirtemberg, for the use of the military academy at Stutgard, a much shorter manual, or text-book, entitled *Erste Gründlehren des jetzen Europäischen Völkerrechts, in Friedens und-Kriegzeiten*; which may be considered as an abridgment of the *Grundsätzen*.

In the mean time, Moser found the taste so much increased for the cultivation of the positive or practical law of nations, that he conceived the design of composing a greater work upon it, in the form of a system; which, however, that it might not be too bulky, should embrace European affairs, only from the death of the emperor Charles VI. And for the accomplishment of this object, he solicited the support of the European sovereigns. As a precursor of this great work, he began in the year 1777, to bring out, by degrees, essays on the latest European law of nations, in time of peace and war, chiefly from the state proceedings of the European powers, and other events, which had occurred from the year 1740. This work appeared in

1780; and contains a rich store of materials for the study of the practical law of nations.

During the time he was engaged in composing this essay, Moser gave up entirely the intention of bringing forward his still greater work before alluded to, chiefly on account of the very slender support he received from the European cabinets. But on the other hand, he resolved to publish, in a separate work, what had come under his observation, in the composition of his essays. And then appeared, *Beytrage zu dem neuesten Europäischen Völkerrecht in Friedenszeiten*, and, *In Kriegzeiten*, the former in four parts, 1778; the latter in three parts, 1779–1781.

From the preceding narrative, it is plain, the works of Moser, upon the practical or European law of nations, divide themselves into two classes; and are partly outlines, elementary treatises, for teaching, partly more extended, and complete works.

To the first class, belong the *Anfangsgründe*, the *Grundsätze*, and the *Ersten Grundlehren*; to the second class, the *Versuch*, or Essay, and the *Beytrage*, or Contributions. In all these works, there prevails almost the same order and division, from which may be seen, what notion he had formed of the range or sphere of the science of the European law of nations. Thus he almost uniformly divides all his works, into the following heads. He begins with a preliminary treatise on the rules, according to which sovereigns ought and are bound, to regulate their conduct, and on the value of precedents in the law of nations. He then treats of Europe, so far as it forms a particular class, assemblage, or society of nations; of the persons and families of

sovereign princes; of rank and ceremonial among nations; of embassies; of sovereignty and dominion over territories and seas; of sovereigns, official functionaries, and subjects. And then, after discussing various institutions, and affairs, religious, political, judicial, military, financial, commercial and monetary, which relate to the internal, private, public or constitutional law of states, and do not properly belong to international law, he proceeds to the exposition of what is correctly termed international law, namely of treaties and leagues; of pretensions, complaints, disputes, and mediation; of vindication of claims by force, retention, arrest, reprisals, embargo; of war; of allies, auxiliaries, and subsidies; of neutrality; of truces and suspension of arms; of treaties of peace.

The mode of treating the preceding subjects, throughout the whole of the works of Moser before mentioned, is, as we have already remarked, almost one and the same. And as he expressly declares in his prefaces to these works, Moser makes it an invariable rule, to expound merely the proceedings and occurrences incident to, or which concern the practical law of nations, and throughout he pronounces no individual opinion or judgment upon them, (which he calls, reasoning and philosophizing), as he believes, that private judgment upon them is wholly useless, and frequently unbecoming. From this opinion, von Ompteda, in 1785, very properly dissented. "I hold," says he, "that in the law of nations, as in every other science, it is quite legitimate for the learned to treat the subject scientifically, which is far remote from legislative usurpation; to refer the passing events to



fundamental principles; and to judge of them according to those principles." But Moser remained throughout firm to his own assumed rule of conduct; and did not allow himself in any of his works, to lay down as a ground, or foundation, the smallest principle of the natural law of nations. In this way, his elementary books for teaching, or text-books, consist of mere dry and meagre, though learned, lessons of experience; which are not supported by any general principle, or placed in connexion; and are entirely and exclusively practical, in the proper, but perhaps too restricted sense, of that term. In the more complete works, the *Versuch*, and the *Beytrage*, these dictates of experience, are repeated and illustrated by copious precedents, from the most recent times. And it is in consequence of these extracts from the public records, of various descriptions, that the works of Moser have become so voluminous.

Such is Moser's mode of investigation. "But by this description of it," says von Ompteda, "I by no means wish to detract from its merits, which I always considered great." Moser himself does not maintain, that he had produced anything perfect or complete, or of the character of a regular system; and could not do so correctly. But in the science of the practical law of nations, he laboured admirably, so as to merit the name of its founder. And he deserved the cordial thanks of all his successors, who soon learned to recognise the value of his laborious exertions, and of his good arrangement of the propositions, which belong to that science, as well as of the excellent materials, which he accumulated for their use.

“Moser had,” says M. Schmalz, “the merit of rescuing the law of nations from the vain speculations of certain philosophers, whose pretensions he combated with warmth. And, although he so expresses himself, as if he founded the law of nations upon the treaties of states, in the sense of their contents forming its object, yet he has in fact founded the whole science upon custom and usage alone, and rightly; and he has been careful to demonstrate the existence of such customs, by a reference to facts, and events, which have actually occurred. But he has not only neglected the philosophical exposition of historical fact, the discovery of general principles, which might at once satisfy reason, and the views and practice of common life; he has also expressed his detestation of them; and confounded the judgment of theory upon general questions, with the unwarranted judgment of a private individual, upon the conduct of a cabinet or government, of which he plainly cannot sufficiently know, either the motives of action, or the circumstances in which it was placed.”

Next to Moser comes to be noticed in the order of time, among the yet small number in Germany, of the teachers of the practical law of nations, Privy counsellor and Professor Achenwall of Göttingen, not so much on account of what he actually accomplished, as on account of the zeal he evinced for the advancement of the science. This excellent man, in the last years of his life, probably roused by the example of his father-in-law, the learned Moser, resolved to cultivate the practical or European law of nations, systematically, and according to his custom, profoundly. And he actually made a

beginning, by preparing outlines of such a work for the use of his students. But from giving it to the press, he was prevented by death. And there was merely published afterwards, in 1775, a fragment entitled, *Juris Gentium Europæarum Practici Primæ Lineæ*. In this fragment many of the most important subjects of the *jus pacis* are wanting; and the *jus belli* is not touched. But such subjects as are treated, are conveyed in short propositions clearly expressed, and arranged with philosophical precision.

About the middle of the last century, also, 1747, 1764, 1776, the Abbé de Mably published his work, entitled, *Le Droit Public de l'Europe, fondé sur les Traités*, 3 tom. 8vo. This useful work, which, as its numerous editions show, met with great approbation, contains a brief extract of all the national treaties from the peace of Westphalia, to that of Paris in 1763, with an accompanying history of that treaty; and it is to be considered as the most important and interesting work upon the state of affairs in Europe, during the period alluded to. Nevertheless, De Real justly observes, "Le titre de Droit Public de l' Europe, que l' auteur a donné a son ouvrage, est vicieux. L' Europe n' a point de droit public; mais chaque nation en a un; et la matière, que l' auteur a traité, se rapporte au droit des gens," or international law.

Finally, towards the end of the period we are now contemplating, there appeared, in 1783, a work by Professor Neyron of Brunswick, entitled, *Principes du Droit des Gens Européen, Conventionel et Coutumier, ou Précis historique, politique, et Juridique, des Droits et Obligations, que les états de l'Europe, se sont*

*acquis et imposés, par des conventions, et des usages reçus, que l'interet commun a rendu necessaires.*

And to judge from its title, this book might be considered as the first complete systematic work on the practical law of nations. But the misfortune is, that it does not by any means correspond to its title. In short, the author does not appear to have formed for himself, any distinct idea of the practical law of nations. The greater part of the contents belong to history, to the constitutional law of states, and to politics; and it contains an ample treatise on the art of deciphering.

With regard to the collections of the records of the law of nations, during this period, little farther progress was made. A continuation of the great collections of Dumont, Rousset, and Barbeyrac, had not yet been thought of. It was only about the close of this period, Privy Counsellor and Professor Wenck of Leipsig came to the resolution of giving a continuation of the *Corpus Juris Gentium Academicum* of Schmauss, and published the commencement of it under the title of *Codex Juris Gentium recentissimi*, afterwards extended to three volumes. And the collection by the very able Charles Jenkinson, the first earl of Liverpool, which appeared in England about the close of this period, (1785), in 3 vols. 8vo, contained only the treaties of peace, alliance, and commerce between Great Britain and other powers, from the treaty of Munster in 1641, to that of Paris in 1763.

## SECTION SEVENTH.

*Period from the age of von Ompteda and von Martens, to the present times; from 1785 and 1790, to 1840.—Union of Natural and Positive International Law.*

WE come now to the last period of the history of international law, from the age of von Ompteda and von Martens, namely, from the latter part of the last century, to the present times. Here we feel sensibly, especially with reference to Germany, the great and parental cultivatrix of the science of international law, the want of the accurate information and impartial criticism of von Ompteda—the guide upon whom we have hitherto very much relied; and we must endeavour to supply this want by occasionally resorting to his continuator, von Kampts, in his *Neue Literatur des Völkerrechts, seit dem Jahre 1784*, and by a particular examination of the works, which have appeared during this period.

At the commencement of the immediately preceding period, we found, that the cultivation, as a science, of the law of nations, had made great advancement. Abandoning the doctrine of Pufendorff, which identified the *jus gentium*, with the *jus naturæ*, the law of nations, with the moral precepts applicable to the conduct of individuals, so far distinguishing legality from ethics or morality, and viewing the actual juridical relations of nations to each other, as such, Wolff

had produced a comparatively complete, exact, and in general, well-founded system of natural international law. And Vattel had corrected some of the errors, and popularized the whole of that system. We say natural, or as it is sometimes denominated, necessary international law. For, where the terms nature, or natural, coupled with the term, law, are employed to represent, not an imaginary or fictitious state of nature, antecedent to the establishment of civil society, which never had any real existence, but the actual state, or condition of mankind, as found, by experience, to be congregated into communities or states, in their internal, or external relations to each other—as resulting from the principles of the human constitution, and from the circumstances, in which men have been placed by their Creator on the surface of this globe—independently of any positive act, or arrangement on their part—these terms have a distinct and definite meaning; and may, with propriety, be applied to law; as distinguishing law, antecedent to, or independent of, human enactment, or regulation, from what is usually denominated positive law.

During the preceding period, we also found, that, as Leibnitz had originally suggested the idea of collecting the scattered records of the treaties among, and of the other state documents of, the different European nations, Moser improved upon this suggestion; and observing the great increase in those scattered records of treaties and other state documents, which had resulted, from the more intimate connexion, and more frequent intercourse with each other of the European nations, from the causes we formerly pointed out,

conceived, and so far executed the design, of not only collecting, but arranging in a scientific form, the contents of these treaties and other documents.

In this way, Wolff and Moser not merely restored the science of international law, but, as it were, created it of new. They cultivated it in different ways ; and gave it a twofold form, deviating a good deal from each other ; but still giving it a definite regular shape. In short, Wolff constructed a complete edifice, a scientific system of the natural law of nations. Moser undertook the cultivation of the positive law of nations ; and out of it constructed a science, which had been hitherto unknown.

Now, as the immediately preceding period from 1740 to 1785, was distinguished by the twofold, but separate cultivation of the law of nations as natural, and as positive, the period we are now contemplating, from 1785 to 1840, is distinguished by the still more successful cultivation of these two branches ; but combined and united, so as to form one whole ; just as the common, or consuetudinary law, or jurisprudence, and the statutory law, or legislative enactments respecting individuals, when united, form the whole of the internal private law of a nation.

Of introducing this more complete view of the law of nations as a science, the merit appears to belong to Baron von Ompteda, in his very learned, scientific, and highly valuable work, published in 1785 and entitled *Literatur des Gesammten sowohl Natürlichen als Positiven Völkerrecht*.

Of his introduction, the first section is upon the

literature of the law of nations in general, its sphere or range, and different parts ; and the second, on the works which treat of that literature.

The first part of the work itself is a history of the science of the law of nations, in ancient and in modern times; and the information and criticism contained in this part, appeared to us so valuable, that we have thought it would not be unacceptable to that portion of the public, who take an interest in such matters, to exhibit in the course of the preceding observations, a sort of abridgment of it, in an English dress.

The second part contains the bibliography of the law of nations, a *Catalogue Raisonné*, a scientifically arranged account of the various works on the law of nations, interspersed with biographical notices of the authors; and this part has since been added to, and continued by von Kamptz, in his work published in 1817, entitled *Neue Literatur des Völkerrecht seit dem Jahre 1784, als Ergänzung und Fortsetzung des Werke des Gesandten von Ompteda*.

To the two parts of his work just mentioned, von Ompteda has prefixed a short treatise on the notion, limits, and different parts of the united law of nations, positive as well as natural, with an annexed projet of a complete system of that law. And the views taken by the author in this short treatise, as well as in his history, display great acuteness, and are equally enlarged and profound.

Contemporary with von Ompteda, was the very learned and indefatigable G. F. von Martens; who, though perhaps less acute and profound than von Ompteda, contributed still more to the advancement of inter-



national law, in point of extent of writing, and in the collection of treaties and other valuable materials. In 1784, he published *Primæ Lineæ Juris Gentium Europæarum Practici*, and this work he re-published in a more perfect form, in 1789 and 1801, under the title of *Precis du Droit des Gens Moderne de l'Europe, fondé sur les Traités, et l'Usage*. In 1791, he commenced and continued at intervals, his *Récueil des Principaux Traités conclus par les Puissances de l'Europe depuis 1761, jusqu'à présent*; and since his death, this collection has been continued in a long series of vols. 8vo., down to the present time. In 1801, he published also a *Cours Diplomatique ou Tableau des Relations Exteriéures des Puissances de l'Europe*, including the *Guide Diplomatique*, and the *Tableau Diplomatique*. In 1802, he published *Erzählungen Merkwürdigen Falle des neueren Europäischen Völkerrechts*; and the substance of this work, enlarged and improved, has recently appeared in a French dress, published at Leipsic and Paris, in 1827, under the title of *Causes Célèbres du Droit des Gens*, dedicated to the Russian Emperor, Nicholas. In 1807, he published *Grundriss einer Diplomatischen Geschichte, Staatshandel und Friedensschlüsse, seit dem ende des Fünfzehnten Jahrhunderts, bis zum Frieden von Amiens*; "projet of a Diplomatic History of European State affairs, and Treaties of Peace, from the end of the 15th century, to the peace of Amiens. Finally, subsequent to the works of Schmalz, Klüber, and Schmelzing, to be afterwards noticed, von Martens lived to publish in the year 1821, a third and greatly enlarged and im-

proved edition of his *Précis du Droit des Gens Moderne de l'Europe*; and this edition is valuable, as elucidating the continued progress of the law, down to the state of comparative peace, which has happily succeeded the frustration of the attempt of Napoleon, at universal European empire.

As already observed, the most recent period we are now considering, has been distinguished by the combination and united cultivation of natural and of positive or practical international law. But although happily united, these two branches of international law have, during this period, been cultivated; the one, in a much greater degree, than the other. Wolff, and his follower, and populariser, Vattel, had during the immediately preceding period, in a manner, and to a certain extent, exhausted the subject of natural international law, not like many other Jurists, by *a priori* assumptions, discussions and deductions, nor by the *quasi* mathematical demonstrations of the former, which the latter wisely laid aside; but by patient observation of the legal, or juridical relations among nations, arising from their actual situation as such, on the face of this globe, or from their gradually extended intercourse; and by an analysis of these relations, and deductions from them, of general rules or principles, embracing classes of particulars. What chiefly remained to be done, was to combine these principles with the results of established usage, and conventional treaties.

Still, however, certain German philosophers, not satisfied with the deductions or conclusions of Wolff and Vattel, appear to have desired to trace the rules of

natural international law, to still more general abstract principles, and to have aimed at a higher degree of perfection. To this class belong Kant and Fichtè, and the other philosophers, who, since 1785, have occupied themselves with inquiries and discussions about perpetual peace, the republic of nations, the federal system, and other such speculations. And it may be questioned whether the abstract dogmas in their theoretical works, on the law of nations, and the general public, or constitutional law of states, did not rather dazzle and obscure, than really illuminate. At all events, the law of nations owes to them a smaller portion of its structure, improvement and elucidation, than it received from the contemporary practical school, guided by the leaders of the earlier theoretical school; and this holds with regard to their general intrinsic worth, as well as their relative value. If the works of von Martens and their results, leave far behind them the works of Moser, and of the rest of the practical writers of the earlier periods; on the other hand, the writings on international law of the philosophers of this last period, since 1785, are surpassed in utility by the works of Grotius, Wolff and Vattel.

In prosecuting, therefore, our inquiries into the progress of the law of nations, during the period we are now contemplating, it may be proper to distinguish more particularly, the abstract and theoretical school, from the more practical school, which, adopting in a great measure, the philosophical views of Grotius, Rachel, Leibnitz, Wolff, and ingrafting upon them the practical views of Moser, combined the principles and arrangement of the natural with the positive, or con-

suetudinary and conventional law of nations, so as to form a comparatively complete system of international law.\*

The exposition and development of general scientific systems, was the grand aim and object of the theoretical school. By far the greater number of such systems, propounded during this period, reverted to the connexion of international law with the law of nature, and the derivation of the former from the latter ; and behaved, on that account, to be so far unsatisfactory ; inasmuch as the law of nations is not merely theoretical, founded entirely upon general abstract relations, but to a certain extent conventional and consuetudinary. And, whether amid the multiplicity and variety of the systems of the law of nature, propounded during this period, there arose from these systems any real benefit to international law, is very problematical.

The practical school of this period, on the other hand, embracing the more philosophic arrangement of Wolff and Vattel, likewise produced systems not so abundant in number, but more rich and important in subject matter. And this school distinguished itself more, and succeeded better, partly because the practical demand was here the measure of scientific investigation and exertion ; partly because many profound publicists of high talents, having from experience, and the course of political events, become convinced, that such abstract speculation, in this department of law, led to nothing but mere generally impracticable, and often untenable theories, have latterly taken an active part in the prac-

\* von Kamptz, § 1—3.

tical labours of this school, and illustrated the more important parts of the law of nations, in a series of interesting works. In short, while the theoretical school was employed in inquiries regarding everlasting peace, the universal union of the human race, as cosmopolites and citizens of the world, the republic of nations, the federal system, and other such speculations; the practical school not only collected the treaties and usages of nations, and other sources or records of the actually existing laws of nations; but discussed also the subjects thereof, which had a prevailing practical interest generally, and particularly in reference to the increased commercial intercourse of the age. The maritime and commercial department of the law of nations became an object of the most assiduous study, and assumed more than ever, a pre-eminent station and position in the literature of that science.

Of the different Jurists, who, after, or along with von Ompteda, cultivated the practical law of nations, comprehending the positive, or conventional and consuetudinary, along with the natural, von Martens, whose works we have already enumerated, stands at the head.\* With greater discrimination, and with happier results than his predecessors, he separated not merely the law of nature, but also the general law of nations, from the European or practical law of nations; unfolded the system and particular doctrines of the last, as resting not merely on general abstract principles, but also upon the usages and treaties of the European nations; and thereby laid a more firm foundation for

\* von Kamptz, § 2.

the international law of these states, than had hitherto been done. The different works, says von Kamptz, of this founder of a more complete system of the European law of nations, are distinguished by their entire consistency, by their mutual dependence, and by the support they afford to each other. The one part contains the most select expression and record of the views and will of the European nations upon the legal principles recognised among them; while the other part constructs out of these materials, the system of practical international law. "Martens," observes M. Schmalz, "has in his excellent manuals, exhibited complete systems. He is the first who embraced the whole science, and treated it so thoroughly. To him the science is indebted for its splendid success, with statesmen, and with his contemporaries generally. Yet the science may be still benefited, and farther advanced by being profoundly studied by learned and industrious men, contemplating it from different and varied points of view."

After von Ompteda and von Martens, a series of men of talents, of learning, and of practical business habits, have enlarged and improved, partly the general system, partly the particular doctrines of this European law of nations. As already noticed, this advancement has been most conspicuous in the department of the maritime and commercial law of nations. The lawyers of almost all the European nations discussed the doctrines of this branch of international law. Indeed such practical discussions in this department, had commenced during the preceding period, from 1740, to 1785-90, from the time of Hübner. But any farther notice of the authors and discussions just alluded to,

we shall reserve for a more detailed inquiry into the history of the maritime and commercial law of nations, chiefly with reference to the rights of neutrals; and at present, we shall conclude with a brief notice of the writers on the law of nations generally, who were contemporary with, or succeeded von Ompteda.

In Germany, in 1787, and 1792, C. G. Günther published his *Europaisches Völkerrecht in Friedenzeiten, nach Vernunft, Verträgen, und Herkommen*, 2 vols. 8vo. The title of this book shows, that it embraces both the natural, and the conventional and consuetudinary law of nations. It is a work of great merit. Besides learning, the author exhibits great acuteness and discernment, accurate arrangement and profound skill in the reduction of his subject to certain fixed principles. And it is much to be regretted that he did not find time to finish it, by giving the European law of nations, during war, as well as during peace.

In England, in 1790, George Chalmers following the example of the first Lord Liverpool, published a useful collection of treaties, between Great Britain and other powers, in two vols. 8vo. And in Switzerland, in 1796-7, M. Koch, member of the Institute of France, published an *Abrégé de l'Histoire de Traités de Paix entre les Puissances de l'Europe depuis la Paix de Westphalie*, in four vols. 8vo.

In England, subsequent to Dr Rutherford's Institute of Natural Law in 1756, there does not appear to have been any treatise on the law of nations till 1787; when, in his *Principles of Morals and Legislation*, Mr Bentham, without being aware of the same view, having been previously suggested by Dr Zouch, and

Chancellor d'Aguesseau, gave his aid and support to the introduction of the more discriminating appellation, "international law," as tending to remove the confusion, which had arisen from the use of the ambiguous terms, *jus gentium*; but did not enter into any detail in that department of law, either directly or through the medium of M. Dumont.

The next publication in England on our subject, is the eloquent and philosophic discourse of Sir James Mackintosh, on the study of the law of nature and nations, as introductory to the course of lectures, which he delivered in Lincoln's Inn Hall, on that science, in the years 1799 and 1800. And to judge from this too brief publication, it is indeed to be regretted, the accomplished author did not afterwards find leisure to revise and give to the world the whole, or at least a portion of his course of lectures. This desideratum, indeed, was so far supplied by the author, in his splendid dissertation on the *Progress of Ethical Philosophy*, originally prefixed to the last edition of the *Encyclopædia Britannica*, in 1830, and re-published in 1836, with a preface by Professor Whewell. But we still desiderate the juridical and political views in detail, of this equally profound, as eloquent lawyer, in the private law of states, or jurisprudence, in public or constitutional law, and in international law, natural and positive, or practical European.

The course of lectures appears to have embraced the whole science of man in his individual and social character; first his intellectual faculties and moral habits; secondly, his private moral duties, apart from positive law; thirdly, his relations, as subject and



sovereign, or citizen and magistrate ; fourthly, the principles of civil and criminal laws ; fifthly, the law of nations strictly and properly so called ; and sixthly, the practical system of the law of nations, as observed in modern Europe. The last two divisions of the course only, belong to our subject, and the notices of them in the introductory discourse, are unfortunately very brief. But the high-toned morality, and the elevated views of the nature and destiny of man, so happily illustrated by Sir James Mackintosh in his introductory discourse and subsequent dissertation, command our unqualified approval and admiration. And, while in mere juridical discussions, we should have liked the display of a little more acumen, almost the only point in which we differ from him, in his historical criticism, is in the praise which he bestows upon Pufendorff, as having so much improved upon Grotius, and advanced the science of international law, by denying the latter any separate existence as a science, and reducing it entirely to the law of nature. We consider the opinion of von Ompteda, which we formerly stated at some length, as decidedly more just and correct ; and we hold, that Pufendorff rather retarded the cultivation of international law as a science, upon the principles expounded by Grotius, not by maintaining what is quite true, that coercive law, whether national or international, is a branch of the great moral code, which ought to regulate the actions of individual men, and of states, but by not sufficiently distinguishing the former from the latter ; by blending the two together, and thereby preventing the discrimination from mere ethical maxims, of those rules of justice and

general expediency, which are applicable to nations, and admit of being enforced by physical power, and thereby also preventing the more thorough investigation, and more scientific arrangement of those rules, as founded on the natural juridical relations of nations to each other, and as modified by consuetude and convention.

In 1798, Sir William Scott, afterwards Lord Stowell, was appointed Judge of the high court of Admiralty of England, and his judgments in that character, during the revolutionary war, and the subsequent war with imperial France, which were almost all affirmed by the supreme prize tribunal of Britain, exhibit the most impartial, and for talents and learning, the most splendid judicial administration and illustration of the maritime law of nations, which any country has produced.

The urgency of those times also called forth the learning and the high talents of Mr Ward, in defence of the invaded maritime rights of his country, and produced in 1801, his valuable treatises, on the rights and duties of belligerent and neutral powers, on contraband of war, and on the commencement of wars in modern Europe.

Although they did not add to, or luminously expound the maritime law of nations, like the works just alluded to, it may be proper here to mention the translation in 1801, by Mr Hartwell Horne of the treatise of von Martens on privateers, captures and re-captures; the compendium in 1803, by the same author of the statute laws of the court of Admiralty; and likewise the translation in 1803, of the *Quæstiones Juris*

*Publici* of Bynkershoek, by Mr Lee ; as also the practical treatise in 1812, on the law of nations, by Mr Chitty, of which the chief merit is the arrangement, under the subjects to which they refer, of the reported judgments of Sir William Scott, in maritime prize causes. The second volume, too, of the work published by Dr Arthur Browne, of Dublin, in 1802, which contains a view of the Admiralty law, here deserves to be respectfully noticed. But of any other English, as well as of the other continental writers on the maritime law of nations, the author may take a more extended notice, if he be allowed time to finish his proposed historical view of that branch of international law.

In 1803, in France, M. Gerard de Rayneval published a neat and concise treatise, under the title of *Institutions du Droit de la Nature et des Gens*. In this work, the author has obviously availed himself, and very properly, of the erudition of Germany in this department of law. And he has so far followed the example of Vattel, as to devote the first book, or about a third of his work, to the internal law of states, private and public, or constitutional. But in the second book, he treats of the relations of nations to each other; in the third book, of the states of war and of peace; and in an appendix, of the politics of nations and of political agents, including ambassadors.

In 1809, Professor Saalfeld of Göttingen, published *Grundriss eines Systems der Europäischen Völkerrechts*. This work being merely a text-book for academic lectures, is only elementary; but it exhibits a comparatively good general arrangement.

In 1817, the Prussian privy-councillor Schmalz published a work entitled *Das Europäische Völkerrecht in acht Büchern*, and in 1823, it was translated into French by Count de Bohm, under the title of *le Droit de Gens Européen*. This is the work of a statesman, as well as of a professional teacher of law. It contains many profound and philosophic, combined with, practical views, and is well worthy of perusal.

In 1819, Professor and Councillor of state, Klüber, who took an active part in, and recorded the proceedings of the congress of Vienna, in the years 1814 and 1815, published a very able and distinct treatise, entitled *Droit des Gens Moderne de l'Europe*, in 2 vols. 8vo. In this treatise, Klüber, profiting on the one hand, by the elaborate works of Wolff and his popularizing disciple, Vattel, and on the other by the diplomatic collections of Moser and von Martens, and by the improved arrangements of von Ompteda, von Martens and Günther, has exhibited the result of the labours of his predecessors, in a more elegant and popular, and yet scientific and sufficiently erudite shape. And for the student of the international law of modern Europe, this is one of the latest treatises, and perhaps the most eligible; although, in the sequel, when investigating the different descriptions and sources of that law, and its component parts, we may probably find reason to object to some of his doctrines and arrangements.

In 1818, 1819, and 1820, Dr Julius Schmelzing published in three parts, forming three volumes, a work entitled *Systematischer Grundriss des Practischen Europäischen Völkerrechts*. In this work,

Dr Schmelzing has aimed at a more full and complete classification of the particular doctrines of international law; by introducing the Roman division of the doctrines of private law or jurisprudence, in matters of individual right, as it has been generally adopted by the Germans.

In the first division, he treats of the legal political personality, (*personlichkeit*) of the European states, as he terms it; including the relations of these states to each other, in point of rank, and ceremonial, in point of independence and freedom, and with regard to the personal and family rights of sovereigns or princes.

In the second division, he treats of the real rights (*sachenrechte*) of the European nations; of the modes of acquiring national property; of the land territories of nations; of the property and dominion of the seas and rivers; of the produce of the seas and rivers.

In the third division, he treats of the obligation rights (as he terms them,) of the European nations:— First, of the rights and obligations of the European nations in their amicable relations; namely, of the law of ambassadors; of national treaties; of the trade and commerce of nations; of the acts, written records of the proceedings of sovereigns, and state papers generally: Secondly, of the rights and obligations of the European nations in their hostile relations; namely, of the origin of hostile relations among nations, and violations of the law of nations; of the different modes of prosecuting or vindicating rights among nations; of the means of amicable accommodation, and conciliatory settlement of disputes; of the adjustment and termination of existing disputes through war; of the law

of nations in time of war; international rules and usages relative to the persons and property of the enemy, relative to the undertaking and commencement of war; of conventions with the enemy during war; of allied, auxiliary, and subsidiary nations, and their rights and duties; of the rights of neutrality by land; of the rights of neutrality at sea; of contraband of war; of the right of search, whether "free ship, free goods," whether trade open to neutrals, during war, which is shut during peace; what the latitude or extent of a blockade; to whom the power of adjudging prizes belongs, in disputed cases; how far the right of postliminium takes place in neutral recaptures; system of armed neutrality; continental and blockade system; of the way and manner of terminating hostile relations among nations; of direct communication between the belligerents; of preliminary and definitive treaties of peace; of congresses.

Still later than Dr Schmelzing, appeared at Paris in 1833, in 3 vols. 8vo., the anonymous work entitled *Traité Complet de Diplomatie par un ancien ministre*. This work, which is obviously intended for the instruction in the diplomatic art, of ambassadors, and of the other inferior political agents of nations, and which is calculated to be of considerable use, in that respect, contains also some sound views on international law, as we may afterwards have occasion to remark, although certainly not very happily arranged, and mingled with other subjects, extraneous to that department of law. The preliminary discourse (prolegomene) contains a very brief historical sketch of the international law of modern Europe. The first book treats of

the origin of civil society, of forms of government, and sovereignty, and of social organization in general. The second book treats of the absolute rights of states, as they are called, particularly those relative to commerce, commercial consuls, &c. The 3d, 4th, 5th, 6th, 7th, and 8th books, treat of the conditional rights of sovereign states, as they are called ; property of the state, public treaties, diplomatic style, negotiations and embassies, right of war, neutrality, right of peace, political study of the European powers. The third volume contains a variety of interesting diplomatic documents.

A few years after the French publication just mentioned, appeared in 1836, the work of the very able and learned American lawyer, Dr Henry Wheaton, entitled *Elements of International Law*. Availing himself not merely of the works of the older writers on the law of nations, but also of the more methodical and philosophical treatises of Martens, Schmalz and Klüber, and of the labours of Martens in the collection and arrangement of the treaties of the European powers, as constituting the conventional law of civilized nations, Dr Wheaton has produced an excellent work, which although not British, is indisputably the best of the kind in the English language. In some of his doctrines we cannot altogether concur with him ; and although he has very much adopted the improved plan of Klüber, we conceive his general arrangement is susceptible of a still farther melioration. But of this afterwards, when we come to consider the component parts of international law.

As eminent writers on the *jus naturæ et gentium*, the two Barons de Cocceii should have been mentioned, as having lived during the period between the age of Pufendorff, and the age of Wolff and Moser, towards the end of the 17th, and in the earlier part of the 18th century. The father, Henry de Cocceii composed a voluminous commentary on Grotius, entitled *Grotius illustratus*, in 3 vols., folio. And to this work, his son, Samuel de Cocceii, the Prussian chancellor, wrote an introduction, in one vol., folio, *continens dissertationes proœmiales XII., in quibus principia Grotiana circa jus naturæ per totum opus dispersa ad justum methodum revocantur, mens Grotii obscura sæpius ex ipso Grotio illustratur, et defectus circa ejus principia notantur*. The observations of both these able jurists, especially of the latter, are in general just, and frequently profound; but they did not contribute much to the study and progress of international law in particular, as besides valuable critical remarks, their views were chiefly directed to the illustration of the Roman law, from the law of nature.

There ought also to have been noticed, as belonging to the period between the age of Wolff and Moser, and that of Ompeda and Martens, the useful work of Meister, entitled *Bibliotheca Juris Naturæ et Gentium*, published in 1749–1757, 3 vols., 8vo.; which might, however, have been rendered much more useful, by the alphabetical arrangement of the subjects of the titles of reference to the works of authors being more judiciously and scientifically constructed.



To the same period might also have been assigned the work of the Abbate Galiani, *de' Doveri de' Principi Neutrali*, published in 1782. In this work, Galiani does not confine himself entirely to maritime international law. He discusses, also, the principles of the law of nations generally, and with great boldness, and occasional force of reasoning, propounds his own particular views; which seem to go to establish a code, not of legality, but of ethics or morality for nations, as greatly superior in all respects, to the system of consuetudinary and conventional law, recognised by, and among the European states. But these views, however benevolent, like those of St Pierre and Kant, have not been found practicable, or at least have not been adopted in practice, either during the last or the present century.

## **CHAPTER II.**

**OF THE FOUNDATION, MODE OF STUDY, AND DIFFERENT  
DIVISIONS, KINDS, OR DESCRIPTIONS OF  
INTERNATIONAL LAW.**



## CHAPTER II.

### OF THE FOUNDATION, MODE OF STUDY, AND DIFFERENT DIVISIONS, KINDS, OR DESCRIPTIONS OF INTERNATIONAL LAW.

HAVING thus inquired, perhaps at too great length, how international law has been cultivated as a science, in ancient and in modern times, we now direct our inquiries to the foundation, and to the different divisions, kinds, or descriptions of that law. And in prosecuting these inquiries, it may be of use to endeavour to remove, in some measure, the obscurity, in which the erudite labours of many modern jurisconsults, have involved it.

At the outset, we took occasion to intimate, that our inquiries were to embrace only the compulsory or coercive law of nations. In the course of the last century, more correct and precise views, than had previously prevailed, came to be entertained by jurists, with regard to the proper sphere of coercive law generally, as distinct from ethics; of legality, as distinct from morality. While the rules of morality, or *præcepta virtutum*, continued to be held applicable to the assemblages of men called nations, as well as to individual men, the law of nations appears to have been held to comprehend only those rules of reciprocal conduct—those juridical relations of states—those co-rela-

tive rights and obligations, which have been called perfect, and which admit of being enforced, consistently with justice, reciprocity, and general expediency.

Before, however, the important distinction<sup>1</sup> just alluded to, had been fully recognised, and before the *jus gentium*, or rather the *jus inter gentes*, had been much cultivated as a separate science, jurists had been much occupied with discussions concerning the *jus naturæ et gentium*; the latter term implying, not international law, properly so called, but the law, common to men, as distinguished from the lower animals, or who, at least, have made some progress in civilization. In these discussions, it appears to have been the fashion for eminent jurists, who cultivated law generally, as a science, to contemplate mankind, not as they have actually existed in society, not as known to us from the authentic records of history, or as the objects of actual observation, but as existing in some state, whether of warfare, or of peace, to which no precise date can be assigned, but which is antecedent to the establishment of civil society, or in some other imaginary state, in which man is divested of many of his characteristic qualities. From their writings, it appears to have been the great object of these jurists, by means of the hypothesis of such a state of nature, of which there is no evidence, to discover *a priori*, and establish a sort of code of natural law, antecedent to, and the prototype of all human positive law. And having once established such a system, under the appellation of *jus naturæ*, and unfolded its rules in detail, these jurists were easily led to hold, that the *jus gentium*, more correctly expressed *jus inter*

*gentes*, was nothing else than the *jus naturæ*, applied to nations, *mutatis mutandis*. And such, we have seen, chiefly through the influence of Pufendorff and Thomasius, continued long to be the view entertained by the generality of jurists.

But, so far as it was founded upon a fictitious or imaginary state of nature, in which mankind have never been found to exist, it is plain, the application of the *jus naturæ* to independent states, could not really promote the advancement of international law. And even although this *jus naturæ* had been founded upon, or derived from, the real state of mankind, as ascertained from observation and experience, instead of an imaginary one, it does not appear, that any great advantage can be gained in point of discovery, elucidation, facility of investigation, or ascertainment of truth, by transferring to nations, the rules which have been found applicable to individual men. The only intelligible meaning of the law of nature, in the sense of the jurists, or of law applicable to men in a state of nature, is the law applicable to men, considered with reference to each other, merely as separate individuals, unconnected by the domestic or social union. And this abstraction, it is manifest, so far as it is of any use, may be made equally well, whether we consider men, as so many individual animals, scattered over the surface of this globe, or as living in civil society, but without any reference to their collective capacity, to the state or government, or to any of those institutions which naturally, if not necessarily, arise, in the progress of the species. In the latter view, the law of nature, as it is called, so far as regards individual men, corresponds very much, with

the private coercive law of states, or jurisprudence. And in this view many of the rules of private law, or jurisprudence, applicable to individuals considered separately, or as insulated beings, may be applicable to separate or insulated communities or states. But even the jurists who maintain, that international law is founded on, or derived from, the law of nature, are forced to admit, that, in its application to nations, the law of nature, in their sense of these terms, must undergo considerable modifications, to adapt it to the different subjects, to which it is to be applied. Inasmuch, as the nature of political bodies, is different from the nature of actual individual persons, so many changes must the law of nature necessarily undergo, in its applications to independent nations. Even the natural law of nations, the *jus inter gentes naturale*, deviates sensibly, or rather considerably, from what has been called the law of nature; and the distinction becomes still wider, and more obvious, or rather conspicuous, by the establishment of the additional principles, recognised in the positive or practical law of nations, consuetudinary and conventional.

The following, therefore, seems to be the preferable mode of conducting the inquiry.

First. To give up the idea of transferring the rules applicable to men viewed abstractly, apart from any condition, in which they have ever been found to exist, to nations or communities, formed by the union of men in civil society; and to investigate the principles of the human constitution, as ascertained by observation, experience, and the records of history, and likewise the circumstances, in which men are placed on the

surface of this earth, and particularly the principles and circumstances, by which men have been led, are led, and are likely to continue to be led, to associate themselves into separate communities or states.

Secondly. Either to consider men, although always found living in society, and generally under some kind of government, as separate individuals, with reference to each other, and their families or kindred; in which case we have the internal private law of a state, or jurisprudence; or to consider men, with reference to their civil union, creating a people, state, and government, and to contemplate the individuals so united, not with reference to each other, but with reference to that state or government; in which case we have the internal public, or constitutional law of a state.

Thirdly. To consider the communities, or nations, and governments, created by the social union, not internally, or with reference merely to the individuals, of whom they are composed, but externally, and with reference to each other, as separate states; in which case, we have what has been more correctly denominated, in recent times, not *jus gentium*, but *jus inter gentes, aut civitates*, or international law.

In this way, we shall find existing in nature, independently of human legislation, certain legal or juridical relations, leading to certain rules of action, involving certain rights and obligations, capable of being enforced; which, when collected, and arranged into a system, we may with propriety distinguish, by the separate denominations of law, before enumerated, private or civil, public or constitutional, and international.



Adopting this mode of inquiry, and viewing mankind, as they have been, and are, so far as known to us, and observing the particular conformation of the surface of this globe, as divided and intersected by seas and mountains,\* we may safely conclude, that as they have not been hitherto, so the human species are not likely ever to be united on this earth, into one great community, or nation, or to be placed under one universal government. Such does not appear to have been the intention of the All-wise Creator; and various obvious reasons present themselves, why such an event would not be desirable. But although they be not united in one universal society, various juridical relations exist between man and his fellow-men simply, as such; various rules exist for the regulation of their conduct; various reciprocal rights and obligations, capable of being enforced by such power, as the Creator has delegated to them. And in the same way, although mankind are likely to continue in future as hitherto, to be divided into separate communities, tribes, and nations, comparatively unconnected with each other, there exist among these separate communities, tribes, and nations—certain juridical relations—certain rules for the regulation of their reciprocal conduct and intercourse—certain rights and obligations, likewise capable of being enforced, and which it is just, and generally, or rather, universally expedient, should be enforced, by such means, as are placed at the disposal of such

\* Rivers are not found in experience to be the natural, or ordinary boundaries of nations; the opposite banks even of great rivers, are generally found inhabited by the same people.—*History of India, by the Honourable Mountstuart Elphinstone*, Vol. I. p. 1.

nations. For we decidedly differ from the juridical philosopher Kant, and the philosophic lawyer Hugo, so far, as they hold that legal rights and obligations are dependent for their existence upon the possibility of legislation (*Gesetz-gebung*) by the supreme power of communities or states; however desirable an approximation to such legislation may be, by positive international laws, established by means of consuetude, and conventional treaties. Such legal or juridical relations, and consequent or concomitant rights and obligations, have an actual and real existence, whether enforced by human power, or not, among individuals, and also among nations. They are antecedent to, independent of, and not created by, human legislation. Among individual men, united or living together in communities or states, these legal relations, rights and obligations, are, to a certain extent, perceived and felt, almost intuitively; and are gradually unfolded in the progress of civilization, through imitation, or education in a general sense, through tradition, through the accumulated wisdom and feeling of one age, transmitted to the next, from generation to generation; and thus come to be recognised in usage, and enforced by the legislative and judicial powers of states. Among nations, no such controlling coercive power exists, as is exercised by a community, or state, over its members or subjects. But there exist among nations, legal relations, rights and obligations, similar or at least analogous to those, which are recognised among individuals in the private law of a state, or jurisprudence, and which are declared and enforced by the legislative and judicial powers. And these legal relations, rights, and

obligations, although by no means declared and enforced, in such a distinct and efficient manner, as is done by the internal legislation and jurisprudence of states, come in time to be recognised in usage, especially among the more civilized nations, or by special conventions or treaties; and to be, to a certain extent, enforced by the union of a number of nations, against an aggressive nation, or by what has been called among modern European nations, the maintenance of the balance of power.

Agreeably to these views, nations are collections of men, occupying particular portions of the surface of this globe, or territories, living in civil society, under separate governments, considered in their collective character, and in their mutual relations, as legal persons, or independent states. And the collection of the rules which result from these mutual relations, for the regulation of their reciprocal intercourse, as independent states, in other words, the reciprocal rights and obligations of these collections or assemblages of men, as independent of each other, which may be, and which it is just, and generally expedient, should be enforced, constitute the law of nations, the *jus gentium* in the proper sense of these terms, or *jus civitatum inter se*, or as more recently denominated, international law.

Some recent jurists, such as M. Schmalz, and the anonymous author of the *Traité Complet de Diplomatie*, 1833, have even held, that such legal and compulsory regulations are the only relations and rules of reciprocal conduct, which exist among nations, and that the rules of morality, or *præcepta virtutum*, are not applicable to, and cannot be predicated of, nations,

as such. But there does not appear to be any sufficient or valid reason, why the rules of morality, confessedly applicable to men, as individuals, should not be held applicable to them also, in their collective capacity, as a people; and it seems sufficient, for the purpose of distinct investigation, to mark correctly the boundaries between the ethics, and the law of nations; and to hold, that the latter embraces only those rules of reciprocal intercourse, which admit of being enforced, and which, it is generally expedient, should be enforced.

But this simple view of international law has not, till very recently, been taken by jurists. On the contrary, the law of nations has been divided into, or represented as consisting of, so many different kinds, or descriptions. Thus Grotius himself, and many of his followers, divided the law of nations, into the *jus gentium naturale* or *necessarium*, and the *jus gentium voluntarium*; into the *jus gentium primarium*, and *secundarium*; into the *jus latius patens*, and the *jus arctius patens*; into the *jus gentium internum et externum*; into the *jus gentium absolutum* or *connatum* and *hypotheticum*, or *adquisitum*. Nay towards the close of the last, and in the course of the present century, lawyers of eminence have recognised four descriptions of the law of nations. Thus in his *Litteratur des Völkerrechts*, Baron von Ompteda, in 1785, specifies the *jus gentium naturale* and *necessarium*, or strictly natural law of nations; the *jus gentium voluntarium*, or modified natural law of nations, founded on the presumed consent of civilized states; the *jus gentium pactitium*, or conventional law of nations, founded on

treaties; and the *jus gentium consuetudinarium*, or customary law of nations. And in his learned and judicious work, entitled a *Course of Legal Study*,\* the able American lawyer, Dr Hoffman, in 1836, recognised four divisions of international law; namely, 1. The implied universal or natural law of nations; 2. The voluntary law of nations; 3. The customary law of nations; and 4. The conventional, express, or particular law of nations. It, therefore, becomes necessary, to endeavour, by investigating the meaning of those different kinds or descriptions of the law of nations, to ascertain, whether, and how far, there are grounds for so many distinctions.

Now the *jus gentium naturale*, or *necessarium*, appears to be substantially synonymous with the *jus gentium primarium* and the *jus gentium absolutum* or *connatum*; and the *jus voluntarium* to be substantially synonymous with the *jus secundarium*, and the *jus hypotheticum* or *adquisitum*. And six of the different descriptions of the law of nations, recognised by Grotius, and his followers, are thus reduced to two. But in consequence of their not establishing at the outset, the distinction between justice and the other virtues, the distinction between ethics or morality and legality, they were under the necessity of recognising a subdivision of the *jus gentium naturale* or *necessarium*, into *jus internum* and *jus externum*. The former consists of the principles, which Wolff and his followers ascribed to the natural or necessary law of nations, because, though not obligatory externally, they are

\* Vol. II. p. 450.

binding upon the consciences of nations. To the latter belong those external obligations, which admit of enforcement. And because the observance of the internal obligations of other nations could not, like the observance of the external obligations, be required, or forcibly exacted by a perfect right, the law of nations, thus unnecessarily rendered complex, was divided by these jurists into perfect, and imperfect, meaning, by the latter, the ethics or morality, and by the former, the law of nations in the proper sense of that term.

Farther, the distinction into the *jus gentium absolutum*, and the *jus hypotheticum*, appears to be of little use, if not erroneous. For the component parts of law, rights, and obligations, are all relative, not absolute. And whether we consider men, abstractly, in a state of nature, as it is called, or in a rude state, or view them, as advanced to a comparative degree of improvement and civilization, the one state is equally natural as the other; and to deduce, and apply the rules, the circumstances must be assumed in either case,—of course, not by the mere power of imagination, but from the actual observation of facts.

Farther, according to Grotius, the *jus voluntarium humanum*, may be divided, besides the *jus civile*, into the *jus latius patens* and the *jus arctius patens*. But by the former, he understood merely the *jus gentium voluntarium, universale, aut multarum gentium*; and by the latter he seems to have understood, merely a uniform system of private law, adopted in common by several, or the majority of nations,—such as the private law of maritime commerce, which does not properly form a part of international law.

We have thus reduced the ten or twelve different kinds or descriptions of the law of nations, enumerated by Grotius, or his followers, to two; namely, the *jus gentium naturale*, or *necessarium*, and the *jus gentium voluntarium*. But even this distinction appears to be of little use, if not erroneous, or unfounded, at least in the sense in which these older jurists appear to have understood the *jus voluntarium*, as different from the conventional and consuetudinary law of nations, founded upon their will or consent, either expressly declared by treaty, or indicated by long established usage. The abstract creation *a priori*, of a state of nature, and of a *jus naturæ*, appears to have led to the adoption of the distinction just alluded to, in order to adapt the theory to the actual state of matters. For this distinction manifestly proceeds upon the assumption of a certain presumed or tacit consent by nations, without any adequate evidence of any such consent. In this, however, Grotius was followed by other jurists. Nay, even Baron Wolff, we have seen, in his great work, appears to have supported and sanctioned the introduction of a *jus gentium voluntarium*; not, like Grotius, upon the supposition of a certain tacit or presumed consent of nations, but upon the assumption, that all nations have united themselves, and coalesced, into one great universal civil society, the *maxima civitas* of mankind, and that the will of this state, directing what is for the common good and well-being of all the human race, constitutes laws which all are bound to obey.

But for such fictions, and gratuitous assumptions, there appears to be as little occasion as foundation.

To the appellations of *naturale et necessarium*, applied by Grotius to the *jus gentium*, properly so called, or international law, there can be no objection; because it is the result of the relations observed to have existed, and to exist in nature, without the interposition of men, between or among those aggregate bodies of individuals, as independent states, and because it is necessary and obligatory, inasmuch, as its observance is requisite for the welfare of all mankind, and its rules may be enforced. But the epithet, *voluntarium*, is rather inapplicable; because, if it mean the will of one nation, it is plain, that no independent state has any legislative or executive control over other independent states; and if it mean the joint will of a number of independent states, agreeing upon certain regulations, for their mutual intercourse, it is equally plain, that to support the distinction, the agreement must be proved, either expressly *totidem verbis* by treaties, or *rebus et factis*, by inference and implication from the acts of the parties; and cannot be admitted, upon a vague presumption of tacit consent, or in other words, a legal fiction. Such fictions are certainly to be met with in the positive laws of most nations; but are truly described by M. C. Comte,\* as “suppositions destitute of truth, devised for the purpose of subjecting certain matters to rules, made for different matters; and are only excusable, for the purpose of avoiding the application of positive laws, found to have become mischievous, but which cannot be easily altered by legislative authority.”

\* *Traité de la Propriété*, Vol. II. p. 469.



Vattel, accordingly discards decidedly the *jus gentium voluntarium* of his great master, Wolff, and apparently also the *jus gentium voluntarium* of Grotius, at least as a primary division of the law of nations, properly so called. And he seems to divide that law, viewed as a whole, into the *jus gentium naturale*, and the *jus gentium positivum*. Nevertheless, and not quite consistently, Vattel, in his subdivision of these grand constituent parts, describes the positive law of nations, as comprehending not only the conventional and consuetudinary, but also the voluntary law of nations.\* And following Vattel, Dr Wheaton, one of the latest writers on international law, not only divides that science into the natural and the positive law of nations, but subdivides the latter into "the voluntary, the conventional, and the customary; the first derived from the presumed consent of nations, arising out of their general usage and consent;" the second, derived from the express consent of nations; and the third, derived from the tacit consent of particular nations establishing a peculiar usage between themselves.†

But here with due reference, the nomenclature adopted by Vattel, and too closely followed by Dr Wheaton, is not very correct, and the notions entertained do not appear to have been distinctly formed. For, as already noticed, both the conventional and the consuetudinary law of nations, obviously rest upon the will or consent of nations, express or implied; and

\* Prolegomenes, § 21, and 27.

† Elements of International Law, vol. I. p. 56.

should therefore have been ranked, not along, and co-ordinate with, but under and subordinate to, or as forming parts of, the voluntary law of nations. And apparently observing the error of Vattel, Dr Wheaton endeavours to remedy it, by deriving the voluntary law of nations from the *presumed consent* of nations arising out of their *general* usage, and the customary law of nations from the *tacit* consent of *particular* nations establishing a *peculiar* usage between themselves. But if the voluntary law of nations derives all its obligatory force from the general usage of nations, as inferring or implying general consent, it is neither more nor less, than what is generally understood by the terms consuetudinary law of nations ; which rests upon the general consent of nations, as being, though not *totidem verbis*, yet virtually expressed by their conduct for ages, and as being in fact the practical realization or adoption in practice of the natural law of nations, fixing likewise various points, which may not be prescribed by that law, or are comparatively matters of indifference, but require to be determined in one way or another. And in this sense, the consuetudinary law of nations is very different from what Dr Wheaton calls the customary law of nations ; which is said to be derived from the *tacit* consent of *particular* nations establishing *peculiar* usages between themselves. For the latter, it is plain, cannot be admitted or recognised as a part of the general law of nations, any more than a treaty between particular nations, establishing a peculiar line of conduct, or mode of proceeding between them. And this very limited sense of the term customary does not appear to be sanctioned

either by the vernacular usage of the English language, or as a translation of the modern Latin term *consuetudinarium*, or of the French term *coutumier*. At least if it is to be adopted, it will be necessary to prefix the epithets general and particular, and to divide the consuetudinary law of nations, into general customary, and particular or peculiar customary. The derivation, too, of the voluntary law of nations from the consent presumed from their general usage, and of customary law from the tacit consent of particular nations, does not appear to be either grammatically or logically correct. The will, or consent of a nation, it is abundantly plain, can only be made known, or ascertained from the express language used by them, as in treaties or conventions, or from their own positive acts and deeds, or passive acquiescence in the acts and deeds of others. In the former case, the consent is said to be express; in the latter case, implied, tacit, or in more correct language, virtual. The law presumed, or in more accurate language, inferred, or deduced from the express consent of nations, has been denominated conventional. The law presumed, or rather inferred or deduced, from the tacit or rather virtual consent of nations, has been denominated consuetudinary or customary. And as the usage may be either general among nations, or particular between two, or among a few, the consuetudinary law of nations may, as we have seen, be either general, or particular and confined, like a treaty, to the parties adopting the usage. But there is manifestly no ground for a division of the positive law of nations, not merely into conventional and customary, but also into voluntary, as three co-ordinate

branches. If there be any ground, or room for the admission of the term voluntary, as applied to the law of nations, it is as synonymous with the positive law of nations; which implies not only will and consent, but the practical realization of that will by actual adoption and establishment.

As little does there appear to be any good foundation for the division introduced by Baron von Ompteda, of international law into the natural and the modified natural law of nations. For upon investigation, it appears the Baron means by the modified natural law of nations, those relaxations from restrictions, and meliorations otherwise, which, in the progress of time are superinduced upon a supposed primitive or rude law of nations, in consequence of the advancement of nations in civilization. But the international law of civilized nations, is as natural, results as much from the legal relations actually existing in nature, among these nations, as the international law of rude nations. And as von Ompteda rests his modified natural law of states, upon the general conviction of civilized nations, there is really no ground for propounding it, as a separate species of international law, distinct from what is viewed as the primary natural and necessary law of nations.

The acute Günther seems inclined to think, that this *jus voluntarium* of Grotius and of Wolff, must be derived from an approximation to a more intimate social union among nations, not from any merely presumptive, or probable consent, but from at least a tacit consent to follow and observe that law, such as exists among the European nations. This seems certainly to

be at least the more solid, and better founded opinion of the two, and in this view, the *jus gentium voluntarium* belongs either to the *jus gentium naturale*, as arising from these juridical relations, which exist among nations, independently of the acts of men, from the nature and position of nations as such, whether in a rude, and merely agricultural state, or in what is called a refined and civilized; namely, an agricultural, manufacturing and commercial state all combined; or to the positive law of nations, comprehending the *jus consuetudinarium*, and *jus pactitium*; which we now proceed to consider.

The result of our examination hitherto of the different kinds or descriptions of the law of nations, noticed by Grotius and his followers, has been to recognise only the *jus gentium naturale, necessarium* and *primarium*, as clearly founded in fact. And this we consider as correctly denominated the natural law of nations; as composed of the reciprocal rights and obligations, which arise and exist among nations, from their juridical relations to each other as such; whether in their apparently original rude state, or in a more cultivated state, but without any direct act of reciprocal interposition; and such is, unquestionably the basis of all subsequent international legislation.

But such subsequent international legislation, is by no means altogether excluded, or impracticable. For although independent nations acknowledge no superior on earth, nor any superior except the Omnipotent Creator, the sole, sovereign, irresponsible power in the universe, they have delegated to them the power and means of legally binding each other, to the effect of

justifying the enforcement of the obligations thus created. Beside the rules of the natural and necessary law of nations, which are partly of a positive imperative, but chiefly of a negative prohibitory nature, there is a great latitude of international conduct, of actions between nation and nation, which are of comparatively an indifferent nature, and which experience proves it to be expedient, should be regulated fixed and declared. Nay, even the imperative, or prohibitory rules of the natural law of nations, may in certain instances, be departed from, with the consent of the parties interested. A considerable portion of international law thus comes to be created, by the acts of nations ; and accordingly, there is thus a real foundation in fact, for admitting, in addition to the natural law of nations, arising from their juridical relation to each other, as such, to which we have reduced the various descriptions of international law, before enumerated, as propounded by Grotius or his followers—a body of law, arising not from the natural, or physical and juridical constitution and position of nations ; but from the acts of those nations, in connexion and intercourse with each other. And this farther body of international law, founded on, or created by human agency, we find noticed by Grotius, and more particularly recognised by later eminent jurists, by Wolff, Vattel, von Ompeda, Günther, von Martens, and Klüber, as *jus pactitium*, conventional law, created by treaties, and *jus consuetudinarium*, consuetudinary law, created by long established custom and usage.

Here also, however, we may again reduce the number of the different primary kinds of international law,

admitted even by the late able jurists just alluded to—for, with regard to the two descriptions of the law of nations last mentioned, propounded as separate kinds, the *jus gentium pactitium*, and the *jus gentium consuetudinarium*, although such a distinction may be proper, as a subordinate division, for the purpose of separate and correct treatment—it is plain, they both rest upon the same principle, the consent of nations, either as expressed in words, by special treaty, or as otherwise implied and indicated, by long established modes of acting, custom and usage.

Upon a review, therefore, of the different kinds or descriptions of international law enumerated by jurists, there seems to be no ground for distinguishing that law into any more kinds than two: First, the Natural, necessary and primary law of nations, resulting from the relations of these legal personages to each other—the collection as a whole, of the reciprocal rights and obligations of nations, which admit of being enforced, corresponding to those rights and obligations among individuals, which, in the private law of a state, or jurisprudence, are not declared *a priori* by legislative statute; but are held to exist at common law: Secondly, the Positive law of nations, as established by express treaties, upon the principle of universal justice and expediency, that *pacta sunt servanda*; or as established by long observed usages, corresponding to those internal usages of nations, which are recognised in jurisprudence, as part of the common law.

Correspondent to, if not identical with, the bipartite division we have just recognised, as the only correct one, is the division of international law into general

and particular ; according to which, it either binds all the nations of the earth, or only some of them. And the neglect of this distinction, it has been justly observed by Günther, is the chief source of the disputes among jurists, with regard to the idea, or conception of international law. Independently of the natural and necessary law of nations, arising from, and founded on, their nature, or constitution, as political bodies or communities, and their relative position, as occupying particular portions of the surface of this globe, and without the addition and aid of any obligatory act, or *factum juridicum*, such as convention or treaty, or long established usage, there are scarcely grounds for maintaining a universally, or generally binding law of nations. All other international law is particular, founded solely on the consent of nations, as either expressed, or implied in treaties, which bind only the nations who are parties to them, or as deducible from long established usages in their reciprocal intercourse, inferring mutual consent and adoption of the usage by the nations who have observed it.

Of these two descriptions of international law, the first appears to have been chiefly, if not exclusively cultivated before the time of Leibnitz ; and even long after that period, we have seen, Wolff and Vattel treated chiefly of the natural law of nations. But from about the middle of last century, we have also seen, other jurists, particularly the German, following the example of Leibnitz in his *Codex Diplomaticus*, such as Moser, Wenck, von Martens, von Ompteda, Schmalz and Klüber, have devoted themselves, either exclusively, or partially, to the cultivation of the



positive international law of modern Europe, by forming collections of the treaties among the different European nations, and by arranging, and digesting the subjects of these treaties; and have thus propounded a more practical science, which has come to be designated by the appellation of *Droit des Gens Moderne de l'Europe*, or *das Europäische Völkerrecht*.

Indeed such has been the tendency to the cultivation of the positive law of nations in more recent times, that von Kamptz in his *Neue Literatur des Völkerrechts*, since the year 1784, appears to congratulate his countrymen on the recent greater success of the practical, than of the theoretical school of international law. But, while it may be quite true, as observed by von Kamptz, that the abstract discussions of Kant and Fichté, particularly those of the latter, have not tended to elucidate much the doctrines of international law; care on the other hand must be taken, to guard against the error, to which the practical school is also liable; care must be taken, not to found the international law of mankind entirely on the stipulations of treaties, or even upon the usages of the modern nations of Europe, notwithstanding the high degree of civilization they have attained; and not to assign to the natural law of nations, a subordinate, or secondary place, as M. Klüber seems to have done, in his late excellent treatise, entitled *Droit des Gens de l'Europe*.

In thus endeavouring to form accurate and distinct notions of international law, and of its proper position in relation to the other departments of law, it is likewise necessary to guard against the vagueness and confusion, which arise from many jurists having confounded

international law with the internal, private and public, or constitutional law of a nation, or at least having treated the latter, under the title of *Droit de la Nature et des Gens*. Even the acute Baron Wolff, has so far sanctioned this confusion ; his popularizing follower, Vattel, has allotted a large portion of his work, entitled *Le Droit des Gens*, namely the first book, containing 23 chapters, to the internal law of States ; and this example has been followed by the Florentine professor, Lampredi, in his elegant work, *Juris Publici universalis Theoremata*.

The German habit too, which seems to have existed prior to Kant, but was sanctioned by him, and has, it is singular, been followed even by that acute and profound teacher of Roman law, and general jurisprudence, Professor Hugo,\* of considering *Völkerrecht*, or International law, as a branch of *Oeffentliches Recht*, namely of the public or constitutional law of States, has rather tended to produce vague and inaccurate notions and views of the science of international law, and of its position in reference to the internal law of nations.

\* Juristische Encyclopædie, 1835, p. 441.



## **CHAPTER III.**

**OF THE SPHERE, SOURCES, GROWTH, OR ACCUMULATION,  
AND DEVELOPMENT OF INTERNATIONAL LAW.**



## CHAPTER III.

### OF THE SPHERE, SOURCES, GROWTH, OR ACCUMULATION, AND DEVELOPMENT OF INTERNATIONAL LAW.

HAVING thus endeavoured to form pretty accurate notions of the different kinds or descriptions, of international law generally, and how far these divisions and descriptions are founded in fact, we proceed to inquire into its progress or growth, or how it is gradually accumulated and unfolded.

And without resorting to any imaginary state of nature, whether of peace, or of warfare; and without indulging, along with the Abbé St Pierre and Professor Kant, in the hope of the maintenance of perpetual peace, or along with the cosmopolite writers, in the expectation of the establishment of one universal empire or government over the whole earth, perhaps not to be desired, although it were practicable, we may proceed more consistently with the inductive mode of philosophizing, by assuming nothing as fact, but what is established to have been in times past, or now to be, the state of mankind, by the records of authentic history, or by actual observation. Proceeding upon this principle, we find that in all ages, and in all the different quarters of the globe, mankind have been divided into separate tribes, communities, or nations, occupying a particular range of territory, united among them-

selves under one government, and congregated into one state, unconnected with, or independent of, other tribes or nations, whether adjacent, or more distant.

In tracing the growth and accumulation of the internal law of states, we had occasion to notice the principal causes, which, in addition to, but independently of, the moral feelings of our nature, have led, and continue to lead, to the social union, the formation of states, and the establishment of laws and courts of justice. These causes we saw, consisted mainly, of the considerations of interest which individuals and families had, and have, in the observance of the negative rules of justice; in the support and protection of the individual's right of external action, consistently with the exercise of a reciprocal similar right on the part of other individuals. But to these causes, it is unnecessary here to revert at greater length. Suffice it to say, that we found their operation was so strong and powerful, as to induce and create such a compact union, or coalition of the congregated individuals, as to constitute a separate physical, moral, and legal person or unit, capable of external action, as such, like the physical individual, and resembling an organized natural production, containing in its structure, the elements of its own internal government and regulation. Of these elements, too, we found territory, or the permanent occupation and cultivation of a portion of the earth, or property in land, to be one of the most essential. Indeed we are accustomed to distinguish from states, properly so called, and to designate as hordes, those unsettled tribes, who, wandering over

large portions of the globe, and having no fixed property in land, cannot, by any such close social union, protect all the rights of which man is capable or susceptible. And we can scarcely conceive a state, without a determinate territory, within which, whoever takes up his abode, necessarily subjects himself to the laws and customs therein established.

Instead then of contemplating as we formerly did, individuals living together in society, or as more intimately connected by the ties of family and kindred, the result of the distinction of sex, and of the mode in which the human species is procreated and perpetuated, we now contemplate in relation to each other, those organized societies or communities, which are created by the social union. These aggregate bodies, we find, constitute as well as individuals, separate physical persons, capable as well as individual men, of independent action, towards each other. With regard to the descriptions of actions, of which they are thus capable, and the regulation of these actions, we find them bearing moral, and legal, or juridical relations to each other; in other words, possessing certain rights, and subject to certain reciprocal obligations. And as the principal of these rights, we find, that like individual men, these aggregate bodies have a right over their own actions, and a right to certain external objects within their reach or power, for their subsistence and other such purposes; in other words, have a right to undertake engagements, or to contract, and a right to acquire property.

Farther, to revert to the descriptions of actions, of



which such aggregate bodies of men are capable, we find from experience, as just observed, that there exist among them, as well as among individual men, certain relations to each other, with regard to their reciprocal conduct, whether in a rude, or in a more civilized state ; that some of their actions with reference to each other, are morally right, and highly praise-worthy, but cannot be enforced ; that others are not only morally right, but may have the performance of them compelled by coercion ; and that others are not only morally wrong, but may be prohibited and prevented by resistance, and other forcible means. The last two of these three descriptions of actions constitute the sphere ; and the rules for the regulation of them, constitute the component parts of international law, as distinct from the morality of nations in relation to each other.

The knowledge of these rules appears to be acquired, not *a priori* from any innate or connate ideas, or from any abstraction or mere operation of the mental faculties confined to themselves ; but from observation and experience, from the exercise of the faculties, with which mankind are endowed, upon the objects and events, which are situated, or take place around them. Some of those rules are so obvious, as, though frequently neglected and violated, especially in barbarous times, to be nevertheless perceived, and indirectly recognised, in almost all stages of society, after mankind have begun to cultivate the earth. And although for a time neglected or violated, like the similar rules applicable to individuals congregated into communities, they

also come, in the progress of civilization, to be more distinctly recognised, and to a certain extent, observed and acted upon. Such observance is found to be advantageous, not only for the particular nation, but for all those nations generally, who, from vicinity, or other causes, have frequent intercourse. The rules of reciprocal conduct, resulting from the relative situation in which mankind, associated in communities, are placed, on this globe, come in time to be adopted in the shape of usages and customs, and to be supported by the majority of states, having intercourse with each other. The utility, too, of conventions or contracts in civil life, is found to extend also to the intercourse of nations ; and various rules come to be fixed, between, or among independent states, by express stipulation and treaty.

From the preceding observations it appears, how there may exist a science of the law of nations, namely, that of the juridical rights of nations among themselves, or in relation to each other ; and how it is distinguished from public or constitutional law, which unfolds the rights of the supreme power of a state. Public or constitutional law separates the social body into two, physical and moral, or legal persons,—the sovereign and the people. International law assumes the whole social body united, as one physical, or moral, or legal person, and investigates only its relations, to other such persons, who are extraneous or foreign to it.\*

But it may here be proper to investigate, and illustrate more fully, the range, or sphere, and the legitimate

\* Schmalz, Das Europäische Völkerrecht, Buch I. S. 8.

sources of international law. Besides the rules of justice, which are chiefly of a negative description,—*neminem lædere, suum cuique tribuere*,—which are applicable to independent nations, from their nature as such, from the circumstances in which they are located on this globe, and from their urgently expedient, if not absolutely necessary, intercourse with each other, there exist a great multiplicity and latitude of actions and proceedings, not merely possible, but shown by experience to be practicable, which are optional, and to be directed by the will and consent of these nations. And there is thus ample room for having such proceedings regulated, either by express consent in treaties, or by the consent implied in long established customs and usages.

In the course of the last three centuries, the reciprocal rights and conduct of the European nations towards each other, have come to be very much regulated by special conventions or treaties. But these, although they embrace and provide for a great variety of cases, and, from great similarity of provisions, admit of classification and scientific arrangement, are of themselves binding only on the contracting parties. And the greatest part of the general law of nations has been introduced by, or grown up through, and rests upon, established customs and usages, adopting and sanctioning legal principles, and fixing rules of practice where such principles may not apply, founded on the constitution and circumstances of mankind, and deduced from observation and experience.

In the same way as among the citizens of a state, or the subjects of a realm, so also among the nations who

inhabit contiguous territories, or have frequent intercourse with each other, there come to be adopted gradually, and to be recognised by tacit acquiescence, various consuetudinary rules of conduct, varying according to times, situation, or circumstances, and occasions or opportunities; but forming a positive law of nations, bearing the same relation, as all other positive law does, to natural law. "Were we to imagine," says M. Schmalz,\* "a diet, or general congress of neighbouring nations to be assembled, or held for the purpose of digesting a common international code, the laws which custom and usage had introduced, would always be, among these nations, as they are among the citizens of each state, the groundwork or basis of the legislation. The use of Embassies to facilitate the intercourse of nations, as little appears to have had its origin in any such diet or congress, as the invention of Bills of Exchange appears to be attributable to any legislator. The nature of these two institutions, or modes of proceeding, neither the diet nor the legislator could alter. It rests on usage; and wise legislation can only regulate what custom has formed out of reciprocal wants and necessities."

"It must be obvious, however," continues M. Schmalz, "that no common or general positive law of nations can be formed out of the particular treaties or conventions of single nations, however similar they may be. These treaties can be used for the construction of the science, only in order to see and ascertain what has been propounded or recognised in them all, as

\* *Das Europäische Völkerrecht*. Berlin, 1817. Buch I. S. 10.

their principle or basis : and that recognised principle or basis is nothing else than custom or usage. Customs or usages, then, or what may be inferred or deduced, as a consequence from a custom, for cases similar to it, are the sole source of international law."

"These customs or usages," adds M. Schmalz, "are, no doubt, subject to variation ; as time changes every thing earthly. For the most part, however, they are more durable than positive laws, or treaties among nations. For reciprocal wants and necessities have given them birth ; and mutual interest and reciprocal advantage maintain them. Nay, the very variability, or changeable nature of customs and usages, renders the positive law of nations more susceptible of melioration."

The actual or practical law of nations, then, appears to be made up, first, of those rules of justice and reciprocity among nations, which arise from their nature as such, from their relative position and difference of situation on this globe, and from the urgency of their intercourse ; and which, though not made the subject of express treaty, are recognised and established, and are extended and unfolded in the natural, if not necessary progress of nations, or of the species, from a comparatively rude state, to one of high civilization : Secondly, of those rules, which do not fall under what has been termed the natural law of nations, which do not necessarily arise from their nature as such, whether rude or civilized ; but which come, in the progress of time, to be adopted and recognised, if not by express treaty, at least by inveterate usage, from considerations of mutual convenience, or reciprocal advantage. And

this holds also, even in the cases where the mischief or damage consequent upon certain actions, not the advantage, is equal, or reciprocal.

In short, in its origin, formation and development, international law corresponds, at least to the extent of its capability of enforcement, to the origin, formation and development of the internal private law of a nation. In the latter, the rules of justice and reciprocity in conduct are gradually felt and observed, are imbodyed in practice or usage, as sanctioned by arbiters, or judicial tribunals, and are extended or abridged and amended, by legislative enactments. In the former, the rules of justice and reciprocity in conduct, are gradually more felt and observed, as civilization advances; are imbodyed in practice and usage, and so far ascertained and sanctioned by international judicial tribunals; and are occasionally, and to a certain extent, established by treaties, binding on the contracting parties.

The progress here alluded to, is particularly remarkable and conspicuous, among such nations, as the modern European, who are intimately connected, by being pretty much of one common race, by their speaking, if not one identical, at least similar languages, by their having one common religion, by their vicinity, and opportunity and facility of intercourse by land and sea, and by their gradually, though not simultaneously, attaining nearly the same degree of civilization. Accordingly, the rules for the regulation of the intercourse of independent states, have in the course of the last three centuries, come to form a great body of practical international law. Express treaties, of course

fix for the time the rules of reciprocal intercourse, in certain events, between, or among, two or more independent states ; and from the continued observance of the same modes of reciprocal action, for a long period, there results a custom, or usage, which, independently of any original stipulation, comes to form a legitimate and essential part of the international law of Europe. In certain departments too, and particularly in the maritime department, the European nations have each established certain courts of justice, for the determination of international questions. And, although in many of these courts, a national bias may be traced, greater impartiality in time prevails. The emoluments of the judges of these courts, cease to correspond with the nature of the judgments pronounced by them. A regard for both individual and national character, comes to exercise a salutary influence ; and, though not perhaps to the same extent, or in the same degree, as the private internal law of a state, or jurisprudence of a people, international law comes also to be pretty fairly and justly administered.

From the combined operation of the causes just alluded to, a body of practical international law has grown up, and been formed, in the course of the last three centuries, among the christian nations ; namely, what the German jurists call the practical science of the *Droit des Gens Moderne de l'Europe*. And, although we cannot agree with professor Kant, that the juridical relations of individuals arise from, or are dependent on, the legislative power, (*Gesetzgebung*) created by the union of mankind in communities or

states, we quite coincide in opinion with the juridical philosopher, that an approximation to such legislation, among at least certain classes of independent states, by a conventional or consuetudinary recognition of certain principles and practical rules, is highly desirable, and would be generally expedient. In this way too, the improvements introduced into international law among the more civilized, might be gradually extended to, and adopted by, the less civilized nations of the earth. For, after the recognition of the more improved system, the former could scarcely adopt any other rules, in their conduct towards, or intercourse with, the latter. And such seems to be the chief farther improvement, to be expected in this department of law.

Viewing, in this manner, the actual international law of the European states, as in a great measure, or to a great extent, composed of those juridical principles, and practical rules of justice and reciprocity, applicable from their nature, to nations in a rude state, and equally applicable, as gradually unfolded, to nations in a civilized state, and which have been recognised in practice for ages, we cannot coincide with Klüber, one of the latest and best German writers on the subject, in placing the natural law of nations, as the last, and apparently least important, of the sources of European practical international law. The sources of the *Droit des Gens Moderne de l'Europe*, von Klüber informs us, are, 1. Conventions, express or tacit ; 2. Analogy ; 3. The Natural law of nations.

Now, with due deference to von Klüber's talents, not merely as an acute and learned jurist, but as an able diplomatist, it would surely have been more con-



sistent with the natural order of things, and ordinary mode of proceeding, to have begun with what almost all jurists agree in calling the natural law of nations, those juridical relations, those reciprocal rights and obligations, which exist among nations as such, namely, as assemblages of families of men, united in social society, occupying as territory, a portion of the surface of this earth, and independent of each other; rather than with the special legal relations between or among nations, created artificially, and at a later period, by treaties, or conventions.

That such legal or juridical relations, such reciprocal rights and obligations exist between, or among nations, capable of being enforced, at the instance of one or more nations, against others, consistently with justice, and with general or universal expediency, or with the welfare of the whole of mankind, there appears to be no room for doubt. Such juridical relations exist anterior to, and independent of, the conventions of men; and whether they have been discovered and recognised in practice, or not. Nor is it any valid objection to their existence, that they cannot be expounded and enforced, like the internal law of a state, by the legislative enactment of the sovereign power, or by the determinations of the judicial and executive powers. Although there be no paramount power, for enforcing international law, like that of the internal legislative and judicial, and executive powers of a state, or, in the language of Kant, no *Gesetzgebung*, the rules of international law, not only may be, but are frequently, both enforced and infringed. The more powerful adjacent nations have but too

often injured and oppressed the less powerful ; but history shows, that even the more powerful nations, have at times acted with justice, and both observed and enforced the rules of international law. And the history of modern Europe in particular, shows, that, by united co-operation, several less powerful states have been able to control, and to repress the aggressions of, a state, more powerful than any one of them ; and that such unions for the protection of the reciprocal rights and obligations of nations, have led to the maintenance of that equilibrium or balance of power, among the European nations, which constitutes the bulwark of national independence, and the best machinery yet discovered, though defective, for enforcing the observance of the rules of international law.

Nor does von Klüber, though following in this respect the example of von Martens and Günther, appear to be more happy in his enumeration of analogy, as the second source of positive international law. If by analogy, he meant logical reasoning and deduction, or the inductive mode of philosophizing, then, of course, it is one of the means, by which mankind arrive at the discovery of truths, which they do not perceive intuitively,—applicable to all the other sciences, as well as to international law. But it does not appear, how it can with propriety be enumerated, as peculiarly a source of the latter science.

Neither can we altogether agree with von Klüber, in assigning as the first source of the *Droit des Gens Moderne de l'Europe*, conventions express, or tacit. The Abbé de Mably, indeed, had long previously, in the preface to a new edition, in 1776, of his work,

entitled *Le Droit Public de l'Europe*, rather pompously announced treaties or conventions, as the grand foundation, or chief source of European international law. "Tout le monde sçait, que les Traités sont les Archives des nations, qu' ils renferment les titres de tous les peuples, les engagements reciproques qui les lient, les loix qu' ils se sont imposées, les droits qu' ils ont acquis ou perdus. Il est, si je ne me trompe, peu de connoissances aussi importantes, que celle-la pour des hommes d'Etat, et meme pour de simples citoyens, s' ils sçavent penser ; il en est peu, cependant, qui soient plus negligées." But this is little else, than an elegant and impressive mode of enunciating a truism. Every body knows, that the conventions or agreements which nations make with each other, are recorded in treaties. But the passage just quoted is quite vague, and contains no distinct information, why or how, or to what extent, or for what period of duration, treaties are binding in states; or to what extent, if any, they constitute a part of international law, beyond the special stipulations, which they contain, as binding the contracting parties.

To return to von Klüber's division of conventions into express and tacit, an express convention is distinct, and easily understood,—namely, a treaty or agreement between, or among nations, committed to writing, or at least expressed in language, recognised by the contracting parties. But what is meant by a tacit convention? Being opposed to express convention, it must be a convention not expressed in words, but somehow or other, from acts, or signs, to be inferred or presumed. In short, if not a mere fiction, the only mean-

ing it seems to have, is an agreement indicated by the uniform and continuous conduct of the parties; that is, in the instance we are contemplating, by the custom and usage of nations, for a length of time, in their intercourse with each other. And consequently, such cases do not belong at all to the conventional law of nations, properly so called, but to that department, which has been distinctly enough denominated, the consuetudinary law of nations; corresponding to the internal common, or consuetudinary law of states.

Farther, in the constitution of what has now come to be designated *Droit des Gens Moderne de l'Europe*, perhaps too much importance, and extent of influence, have been ascribed to mere conventions or treaties. To the German nation certainly, we have seen, we are indebted for the creation, in a manner, of the Diplomatic science. The idea appears to have originated with Leibnitz in his *Codex Diplomaticus*. Various vast similar collections we have seen, were made in Holland by Dumont, Rousset and others, and in England by Rymer, Jenkinson, Chalmers and others. But the collection of treaties and other state papers connected with international law, and the arrangement of the contents of those documents into a system, continued to be prosecuted with the greatest zeal and success in Germany, as appears from the *Vernunft und Völkerrecht* of Glafey, the *Beytrage zu dem neueste Europäischen Völkerrecht* of Moser, the *Codex Juris Gentium* of Schmauss and Wenck, the *Literatur des Völkerrechts* of von Ompteda, and the *Recueil des Traités* of von Martens, of which last the supplement far exceeds the original, in number of

volumes, and has been brought down to the present times.

Perhaps however, the Germans generally, and particularly Martens, and Klüber, have, in framing or constructing the science which they have denominated *Droit des Gens Moderne de l'Europe*, ascribed too much to express conventions or treaties, as sources of this law. That treaties between, or among two or more nations, are binding *pro tempore* upon the contracting parties, and constitute the law between, or among them, in all matters embraced by the treaty, there can be no dispute. But beyond this, whether or not, or to what extent, if any, do such treaties go? Do they constitute international law with reference to nations, who are not parties to them? For what period too, when not specified, are such treaties binding even upon the contracting parties? Does a breach of the treaty on the part of one of the nations, dissolve the conventional obligations undertaken by the other parties? What subsequent injurious conduct, if any, is sufficient to liberate either, or any of the contracting parties, from the reciprocal rights and obligations thus expressly recognised and undertaken by them?

That the practical system of international law recognised in modern Europe, is much affected by the treaties, which particular nations conclude with each other, there can be no doubt. But beyond the rights and obligations thereby conferred or imposed upon the contracting parties, the inquiry is, how far are such treaties binding on other nations?

The practical system of international law, now recognised as positive law, by the civilized states of

Europe, we have seen, has chiefly arisen or grown up gradually, from customs and usages, adopted from time to time in the course of ages; and is so far indebted to experience and to history, as the record of such customs and usages. But to give to the body of modern practical international law a scientific form, it is not enough to arrange in order the materials which history furnishes; it is necessary also to search therein, for the notions, which serve as guides, to unfold these rules as derived from the fundamental principles of right and justice, to illustrate their application in detail, and thus to solve difficulties, and to find precedents for such new cases, as may probably occur in future.\*

Now, in the same way, as general history appears to do, the treaties of particular nations with each other, as being the records of such events, may, beside the particular rights and obligations, thereby conferred or imposed, contribute indirectly to practical international law, by showing what matters and rules have been held as requiring particular stipulation, or as otherwise generally observed, under the influence of the natural or consuetudinary law of nations. But beyond this, the treaties among the different European nations do not appear to contribute to the general international law of Europe, or to constitute of themselves, component parts of that law, beyond the rights and obligations, which they bestow or impose on the contracting parties.

Different nations, by agreeing in treaties upon

\* Schmalz, *Europäische Völkerrecht*, Buch I. S. 28.

certain modes of proceeding, do not thereby recognise these modes as part of the general existing law of nations. For, if they did so, there could be no occasion for special treaties, to modify, still less to declare, the already existing law. On the contrary, the necessity for the special treaty manifestly shows, that the particular rules, which it establishes by paction, were not previously, and are not, part of the general existing law.

Nor can it be maintained, upon correct legal principle, that, by a number of nations, in mutual treaties, agreeing upon certain modes of proceeding, as between, or among themselves, such rules, or modes of proceeding, thereby become part of the general law of nations, binding upon other independent states. The very concoction of such treaties shows the understanding, and conviction, of these nations, that such modes of proceeding were not previously, and are not sanctioned by the universal, or general law of nations. And an extension of such compacts to other states, would be manifestly inconsistent with the admitted and incontestable principle of their independence and freedom from foreign control. Indeed, the admissions of von Martens and Klüber, both show, how little treaties and conventions, are to be considered as forming a stable or permanent part of international law. Thus, in his *Précis du Droit des Gens Moderne de l'Europe*, 1801, liv. ii. chap. ii., von Martens makes the following admissions, § 52, that the right of self-preservation authorizes a nation to depart from a treaty, which it can no longer execute without causing its own ruin, or material loss (*sa propre perte*) ; § 53, that treaties are

not obligatory, which are morally impracticable, or of which the execution would injure the rights of a third party; that of two treaties, concluded with different nations, if compatible with each other, the most ancient must be preferred, reserving any indemnification, which may be due to the other nation; § 63, that the experience of all ages proves, nations are usually more disposed to conclude treaties, than to fulfil them; and that accessory, or auxiliary means, were early resorted to, for securing their observance, such as the sanction of an oath, pledges, hostages, &c.

Farther, in liv. ix, von Martens makes the following admissions, § 342, that a treaty expires, when the resolute condition exists, or when the time for which it has been concluded, has elapsed, unless it has been renewed or prolonged, expressly or tacitly; and that there exists in Europe a much greater number of treaties, only tacitly prolonged, than could reasonably have been expected or believed, considering the importance of the object; that the total change of the circumstances, which have been the cause of the convention, renders it invalid; that the same rule holds, if the object of the convention perishes, or changes; that as in simple imperfect or not legally exigible customary rights, each power reserves the right to abolish them, or to depart from them, provided it gives previous notice in due time; and *a fortiori* the mutual consent of nations may abolish or change points of simple or mere practice. In liv. ii. chap. ii., von Martens farther states, § 65, that, in tacit conventions, the consent of the two parties, or of one of them, is inferred from the acts, which afford the



proof of them; that a variety of acts may serve as proof of consent, in a merely present case—a case of immediate performance; but that it is much more difficult to find acts, sufficient to prove an engagement for future and successive prestations; that the smallest part of the law of nations rests upon mere tacit conventions, as distinguished from long established customs and usages.

In the same way, in his *Droit des Gens Moderne de l'Europe*, Part ii. Tit. ii.; Klüber admits, § 154, that the renewal of treaties, or a prorogation of their validity, beyond the stipulated term, is subject to the same conditions, essentially requisite for the original conclusion, and is not of itself, to be presumed; but may take place tacitly, if, after the term has elapsed, the parties continue knowingly, and with deliberate purpose, to fulfil the conventional obligations, and to accept the performance of them. And in Part ii. Tit. ii. § 164 and 165, Klüber farther admits, that public treaties cease to be obligatory; 1. By the mutual consent of the parties interested; 2. When one of the parties, in virtue of a reserved faculty, departs from the convention; 3. By the lapse of the stipulated period; 4. By the attainment of the end, the sole object of the treaty; 5. When the execution of the treaty becomes physically or morally impossible; 6. When there is an essential change in a circumstance, of which the existence was supposed to be necessary by both parties, whether expressly, or according to the nature of the treaty; 7. By the defection of one of the parties, who refuses the execution of the treaty in question, or even of another, quite different; 8. By

the complete and entire accomplishment or fulfilment of the obligations, which are the subject of the treaty; the consequences remaining established between the contracting parties, notwithstanding supervening changes in the situation of affairs.

Although, however, it seems manifest, that treaties of themselves only bind the contracting parties, and although it appears from the concessions just quoted, from two of the latest and best writers on the subject, that the international law, or *Droit des Gens de l'Europe*, so far as it is derived from, or dependent on, treaties, is by no means, of a permanent or stable nature, and is liable to vicissitudes from these treaties ceasing upon various grounds to be obligatory; yet von Martens, and after him, Klüber, appear to hold, that, in addition to the undisputed obligations created by treaties on the immediately contracting parties, while these treaties continue to be in force, some more general international law, may be extracted from them, binding upon third or other parties. Thus, in § 3, Klüber remarks, "Il importe souvent, d'observer, tantôt l'identité, tantôt l'analogie des principes, dont elles (les nations de l'Europe) sont parties, dans les stipulations de leurs traités;" which passage, though rather ambiguously expressed, seems to imply, "It is often of importance to observe, sometimes the identity, sometimes the analogy of the principles, from which the nations of Europe have set out, or departed, or upon which they have proceeded, or by which they have been guided, in the stipulations of their treaties." And, at greater length, von Martens had previously remarked, "that there may be formed, by abstraction, a theory, of what is

most generally practised among the states of Europe, by considering, that, in many points, the numerous particular treaties of those powers resemble each other, so much, in the essentials, that there may be extracted from them, principles, as received among all, who have made treaties upon these subjects ; and that even treaties, though obligatory upon the contracting parties only, serve often, as a model, for the treaties of the same kind, to be concluded with other powers ; whence there results an ordinary mode of contracting, usually observed in practice."

But, however just such reasoning may be, as applied to long established customs and usages, it does not appear to be correctly applicable to individual treaties, or conventions, so as to extend their obligatory force beyond the contracting parties. To hold a legal obligation in relation to all and sundry other nations, to be imposed upon one nation, by the latter having, in particular treaties with several other nations, agreed to undertake, or fulfil, such an obligation, in consideration, probably, of advantages to be obtained by counter-stipulations, would be equally inconsistent with correct logical inference, as with the independence of the nation, against which an obligation is thus attempted to be reared up. The particular treaty is founded entirely on the consent of such nation ; and cannot in justice, by any fiction be extended to other nations generally. According to such a rule of construction, it would be sufficient legally to subject Great Britain to the dictates of the system of armed neutrality, propounded in 1781, so energetically supported by the empress Catharine, and acceded to, from

similar obviously interested considerations, by most of the other maritime states of Europe, that Great Britain had, in several particular treaties, with different nations, agreed to observe such rules, from considerations of reciprocal advantage.

That such was really the meaning of von Martens, can scarcely be supposed. At the same time, the language employed by him, and apparently confirmed by Klüber, though in less explicit terms, seems to bear this import, and ought to be guarded against. And in this observation, as we have already seen, we are supported by the authority of Privy Counsellor Schmalz, a German author on the law of nations, equally recent, as the two just alluded to, and perhaps more a philosopher and statesman, than either.

The short passage here referred to, we shall again recite, prefixing to it some short passages from the same very able author, as showing what are the proper province and sphere of operation of treaties in the formation of international law, beyond binding the contracting parties. "Samuel Rachel, the follower of Grotius, and opponent of Pufendorff," M. Schmalz observes, "carefully distinguished the treaties of individual nations in particular, from the general common law of nations, which rests solely upon custom." "Leibnitz pronounced the definite idea of a consuetudinary law of nations to be equally important to the learned and to statesmen." "Leibnitz himself first commenced the collection of the treaties of states with each other, with a view to the formation and advancement of the science of international law; not as if these treaties were to furnish through their own contents merc-

ly, the substance, or whole body of the science; but because there is to be found in them, pre-eminently, what principles the European powers have recognised as right and just, or what they have propounded, or held, as recognised and unquestionable." "It must be obvious, however, that no common or general law of nations, can be formed out of the particular treaties or conventions of single nations, however similar they may be. Those treaties can be used for the construction of the science, only in order to ascertain, what has been propounded or recognised in them, as their principle or basis. And that recognised principle or basis, is nothing else than custom or usage. Custom or usage, then, or what may be inferred or deduced as a consequence from a custom, for cases similar to it, are the sole source of international law."\*

We have likewise the satisfaction of finding, that, in our objections to the opinion which seems to have been entertained by Martens and Klüber, with regard to conventional treaties, as a source of international law, beyond the contracting parties, we are supported by the still more recent authority of the anonymous author of the *Traité Complet de Diplomatie*, published at Paris in 1833. And although we differ from that author, in so far as he holds the rules of morality or ethics, to be inapplicable to nations, we shall quote from his work a passage relative to the effect of treaties, which is nearly identical with the corresponding passage in the work of M. Schmalz. "Cependant il est evident, qu'on ne sauroit former un droit positif de

\* Schmalz Europäische Völkerrecht, Buch I. S. 10. S. 26, 27, 28.

l'ensemble des conventions particulières des peuples, quelque semblables qu'elles fussent. Ces pactes ne peuvent servir de matériaux pour édifier la science, s'ils ne montrent ce que l'on y a reconnu pour base ; et cette base n'est autre chose, que la coutume ; celle-ci, ou les inductions, que l'on en tire, pour les appliquer à des cas semblables, sont donc la seule source du droit international.\*

In the doctrine thus laid down by M. Schmalz, and the author of the *Traité Complet de Diplomatie*, with regard to conventions among nations, we coincide with the following explanation. Such conventions, or treaties, must of course, be allowed, while they continue in force, to constitute international law between or among the contracting parties. Farther, where the rules of action, or juridical relations arise from the natural constitution of nations, and from their contiguous position and intercourse with each other, customs and usages, as embodying these rules and relations, are of the greatest weight and importance in point of obligatory force. And in the multiplicity of cases, of actions, and proceedings, where natural juridical relations do not exist, or are not perceived, and where the mode of proceeding is left very much to the will and discretion of the individual nation, such customs and usages, form the chief, if not the only rule, where there has been no particular convention.

Besides Martens and Klüber, however, the able and learned American lawyer, Dr Wheaton, adopting their views, seems also in his recent treatise, (1836) to

\* *Traité Complet de Diplomatie*, Tom. I. p. 41.

ascribe to treaties a greater portion of influence in the formation of international law, beyond the reciprocal rights and obligations, thereby conferred or imposed upon the contracting parties, than appears to be warranted by correct legal principle. Thus,\* "the effect of treaties and conventions between nations is not necessarily restricted, as Rutherford has supposed, to those states who are direct parties to these compacts. They cannot, indeed, modify the original and pre-existing international law to the disadvantage of those states who are not direct parties to the particular treaty in question. But if such a treaty relaxes the rigour of the primitive law of nations in their favour, or is merely declaratory of the pre-existing law, or furnishes a more definite rule in cases, where the practice of different states has given rise to conflicting pretensions, the conventional law thus introduced, is not only obligatory, as between the contracting parties, but constitutes a rule to be observed by them towards all the rest of the world." Again, "what has commonly been called the positive, or practical law of nations, may also be inferred from treaties; for, though one or two treaties varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties establishing a particular rule, will go very far towards proving what that law is, upon a disputed point. Some of the most important modifications, and improvements, in the modern law of nations have thus originated in treaties." This doctrine, Dr Wheaton supports, by a

\* *Elem. Internat. Law*, Vol. I. pp. 60, 61.

reference to Bynkershoek, *Quæst. Jur. Publ.* lib. I. cap. 10, and to a speech of lord Grenville, November 13, 1801, upon the Maritime Convention of June, 1801, between Great Britain and Russia. And, no doubt, the doctrine is here very guardedly expressed. But, after all, such treaties have, in reality, and upon correct legal principle, no more effect, beyond the contracting parties, than what, along with Schmalz and the author of the *Traité Complet de Diplomatie*, we have previously admitted and specified in definite terms. They may afford evidence of a very general and long prevailing usage among nations, either confirmatory and declaratory of the rules, which the natural law of nations prescribes—in other words, which arise or result from the constitution of nations, or independent communities, as such, and from the circumstances in which they are placed on this earth in relation to each other; or as ascertaining the rules to be observed, in the multiplicity of indifferent matters, in which the natural law of nations neither prohibits, nor enjoins.

In this way, as shown in the chapter of Bynkershoek referred to by Dr Wheaton, treaties were of use, as ascertaining what articles were, according to the general understanding and usage of nations, to be held as contraband of war, as directly affording the means of offence, or defence, to the enemy. But Bynkershoek does not ascribe any greater force to these treaties. Farther, although he has not beside him at present, the pamphlet, entitled “Substance of a Speech delivered by Lord Grenville in the House of Lords, 13th November, 1801,” the author has looked into



that part of the Annual Register for 1802, which contains the debate alluded to, and he does not find, that lord Grenville there ascribes to treaties, any greater effect, than what has been already admitted. The following seem to be the only passages of the debate, which bear upon the point. "One of the first articles," observed lord Grenville, namely, of the convention with Russia, "would, from its wording, secure the free conveyance of the colonial produce of the enemy, on the ground of its being the acquired property of neutrals. Although this appeared to be only conceded to Russia, yet Sweden and Denmark would derive the same power, if that was made the basis of a general treaty; and in their hands, the privilege would be essentially injurious to this country." In reply, the Lord Chancellor stated, "This was a treaty concluded with Russia separately; and it was not to be supposed, that all other neutral nations were to come under this arrangement. Sweden, Denmark, Holland, and America, were no parties to it; and could not insist on any of the stipulations of it."

From the preceding considerations, we are led to conclude, that in endeavouring to ascertain how any particular point has been determined by the law of nations, we should proceed in the following order. In the first place, we should, especially if it be a peculiar, or unusual point, inquire, whether it has been embraced by any particular treaty between the nations, and whether that treaty be still in force. And so far, we agree with von Klüber, that, as in the international private law of a state, we look first into the statutes or

legislative enactments, so in international law, we should ascertain the import and application of the treaties, or express conventions, which may have been concluded between the nations, before examining the common law on the subject, as founded on equitable principle and established usage; because the latter, however well founded otherwise, may have been departed from, or superseded by, the former. In the second place, we should, on the point in question, consult the general juridical relations of nations, arising from their nature and situation as such, especially as simply and directly adopted, or as varied, or modified by long established practice in the intercourse of states. And in this latter inquiry, and as a record of the rules of international law, which have been recognised in the practice of nations, whether flowing directly from their nature and situation as such, or without being so prescribed by nature, have been adopted and sanctioned by custom from views of general convenience and expediency, we are chiefly to consult the judicial determinations of international courts, and the writings of eminent jurists of all nations, who have illustrated the subject. Indeed, as in the internal private law of a state or jurisprudence, the common law is in general, superior to the statute law in extent of legal view, so in international law, perhaps, the best part in detail is to be found in the judicial determinations of the international courts established by independent nations, and in the ordinances founded thereon, and writings of lawyers, illustrative thereof. For, although such judicial determinations and ordinances may occasionally have been infringements of the true and genuine law of

nations, the judgments of such courts have in later times been guided by generally recognised principles of impartiality and equity, and freedom from national bias, and are likely to be so, still more in future. Indeed, it may be doubted whether the decisions of those international courts should not be viewed as a distinct source of international law. They are more authoritative, than the treatises of private individuals, who are frequently subject to the influence of biases, not merely national, but personal, from individual interest. The decisions, too, of such courts, especially where the judgments of the inferior are liable to be corrected by those of higher tribunals of appeal, if they do not form a distinct source of international law, are a most satisfactory mode by which the usages of nations are recorded, established or rejected; and if impartial, in a manner constitute a part of international law; while mere conventional treaties, usually made in particular circumstances, for particular purposes, are frequently deviations from that general law. At all events, the judgments of these tribunals, distinctly ascertain the practice of each independent state in the administration of international law; and as well as ordinances, orders in council, and other such government regulations, establish that law, upon the principle of reciprocity, if not in favour of, at least against the states, by whose tribunals they are pronounced.

## **CHAPTER IV.**

**HISTORICAL REVIEW OF THE PRINCIPAL MORE RECENT  
CLASSIFICATIONS OF THE COMPONENT PARTS  
OF INTERNATIONAL LAW.**



## CHAPTER IV.

### HISTORICAL REVIEW OF THE PRINCIPAL MORE RECENT CLASSIFICATIONS OF THE COMPONENT PARTS OF INTERNATIONAL LAW.

HAVING thus endeavoured to form a pretty accurate notion of international law; inquired historically into its cultivation as a science, and considered at some length, the different kinds or descriptions of international law; its range or sphere; its sources, and its gradual growth or development; we proceed to inquire, what are its general, or primary component parts, and how far they are susceptible of scientific arrangement.

- As in contemplating the rules of the internal law of states, we found it convenient, agreeably to ordinary practice and language, to view them under the aspect of the thence resulting rights and obligations of individuals, which constitute jurisprudence, so in contemplating the general rules of international law, we may view them under the aspect of the thence resulting rights and obligations of nations towards each other.

In our historical sketch we have already sufficiently noticed the method and order adopted, by Albericus Gentilis, Grotius, Zouch, Wolff, and Vattel. And we shall now shortly examine the more recent arrange-

ments of von Martens, of Lampredi, of Rayneval, of Schmalz, of Klüber, of the author of the *Traité Complet de Diplomatie*, and of Dr Wheaton, with a view to a more scientific classification of the chief component parts of international law.

With all the important services he has rendered to the science of international law, von Martens, certainly, in his *Précis du Droit des Gens Moderne de l'Europe*, does not excel in general logical arrangement. This will be manifest from the following very short review of the contents of his work. In his first book, he treats of the states of Europe in general; of the connexion which subsists among them; and of their political divisions, and constitutions, as in relation to each other. In his second book, he treats of the manner of acquiring positive rights among nations; and under this head, discusses the acquisition of property by occupancy, international treaties, usage, analogy, and prescription. In the third book, he treats of the reciprocal rights of states, relative to their internal constitution; and very properly confines his discussions to the international questions which arise in this department, without falling into the error of Vattel in occupying a third part of a work on the law of nations, with treatises on the internal, public, and even private law, or jurisprudence of states. The fourth book he devotes to the rights of nations, relative to foreign affairs; and under this head, rather awkwardly, and not very appropriately, introduces the rights of nations to the maintenance of their own security and independence; their equality in point of right; their precedence and dignities; and their rights, relative to

commerce, and upon the sea. The fifth book, he confines to the rights relative to the persons and families of monarchs or princes. In the sixth book, he treats of amicable, and diplomatic negotiations. In the seventh book, he treats of embassies, and of the different kinds of diplomatic ministers and political agents. The eighth book, he devotes to the defence and prosecution of international rights, *viâ facti*, by physical force; and under this head, he treats of re-torsion and reprisals; of the commencement of wars; of the rights of belligerent powers regarding the manner of carrying on war; of military conventions by belligerents; of allies and auxiliaries; of neutrality; and of the re-establishment of peace. In the ninth book, he treats of the extinction of acquired rights among nations.

Lampredi, following Wolff, gives the following somewhat improved, but still defective arrangement, in the third volume of his *Juris Publici universalis Theoremata*. After his *Proæmium, de Origine Juris Gentium*, he treats in his first three chapters, *De Officiis Gentium erga seipsas, de Dominio et Imperio Gentis, and de Gentis propagatione*. Then, entering upon international law, properly so called, he treats in the 4th, 5th, 6th, 7th, and 8th chapters, *De Officiis Gentium erga alias, de æqualitate et libertate Gentium, de Officiis Gentium, quæ ex Dominio et Imperio ortum ducunt, de Jure Necessitatis inter Gentes, and de Præscriptionibus inter Gentes*. In chapters 9th and 10th, he treats, *de Pactis Publicis, et Fœderibus Gentium, and de Accessoriis Fœderum, de Garantigiâ, Pignore, et Obsidibus*. In chapter 11th, he expounds, *Quomodo*



*Controversiæ Gentium componuntur.* In chapters 12th and 13th, he treats *De Jure Belli*, and *De Jure Gentium in Bello*. In chapter 14th, he treats *De Pacificatione Pacis*; and in chapter 15th, *De Legationum Jure*.

After devoting the first book to the internal public law of states, in imitation of Vattel, M. de Rayneval, in his *Institutions du Droit de la Nature, et des Gens*, adopts in the second and third book the following rather improved, but obviously not very logical arrangement. In the second book, concerning the relations of nation to nation, he treats of the independence of nations; of their territory and its limits; of communications between nation and nation; of commerce; of alliances and the obligations resulting from them; of the modes of acquisition among nations, and of prescription; of the sea, rivers, and lakes; of guarantees, of retorsion, reprisals, embargo, and retaliation; of foreigners, and political agents; of the titles, rank, and dignity of sovereigns. In the third book, concerning the state of war, and of peace, he treats of the origin, causes, and declaration of war; of things permitted or prohibited, by the laws of war; of the effects of war, conquests, prisoners, hostages, inhabitants of conquered countries, sieges, blockades, capitulations, and safe conducts; of allies, associates, auxiliaries; of neutrals, of maritime war, visitation of vessels, letters of marque, prizes; of conventions between enemies, truces, suspension of arms; of the right of postliminium; of treaties of peace, arbiters, mediation; of the execution, interpretation, observance and non-execution of treaties.

In his valuable work, entitled *das Europäische Völkerrecht in Acht Büchern*, Berlin, 1817, M.

Schmalz, as he designedly avoids some of the formalities usually observed in German works on law, appears also not to have aimed at any very logical, or scientific general arrangement. In the first book, he treats of the formation of a law of nations, and particularly the European law of nations. In the second book, he treats of the European powers, of the general rules of the European law of nations ; of treaties, and of the rules observed in this department of the European states. In the third book, he treats of the rank, functions, and rights, of diplomatic agents. In book fourth, he treats of the reciprocal rights of nations, with reference to the constitution of the state, jurisdiction, and administration of the government. In book fifth, he treats of the personal relations of sovereigns, of the maritime rights of nations, of the commerce of nations, and of the independence of nations. In book sixth, he treats of hostilities among nations in general, of the commencement of war, of the mode of carrying it on in general, and of the consuetudinary law of nations, concerning particular operations in war. In book seventh, he discusses treaties with the enemy ; the conclusion of peace. In book eighth, he treats of allied powers, and of neutrality.

In the preceding short review of the plans of the principal works on international law, which appeared towards the close of the last, and in the course of the present century, we find considerable improvements in the more minute arrangements of particular departments in detail. But it seems to have been reserved for Klüber, in his *Droit des Gens Moderne de l'Europe*, Stuttgart, 1819, not only like von Ompteda,

to take, but also to execute, and actually realize, to a certain extent, a more comprehensive and methodical view and plan of the entire science of international law, as a whole.

In his introductory title, he discusses the general and preliminary principles of the science; and treats first, of the definition, parts, and sources of the law of nations; of the sciences connected with and subservient to it; and in the second place, of the history and bibliography of that law. He then divides his work into two parts. In part first, he treats of states in general, particularly in Europe: first, of the definition, relations, sovereignty, and union of states generally; secondly, of the European states. In the second part, he treats of the rights of the states of Europe in relation to each other; and these rights he divides into absolute and hypothetical. In title first, he treats of what he calls the absolute rights of the European states in relation to each other; of self conservation, of independence, of equality. In title second, he treats of what he calls the hypothetical rights of the states of Europe, in relation to each other; and these he divides into two sections; the rights of states in their pacific relations; and the rights of nations in a state of war. In section first, he treats of the right of property in the state, of the right of treaties, of the right of negotiation, particularly by public ministers. In section second, he treats of the rights of war, of the rights of neutrality, and of the right of peace.

There is here, manifestly, a great improvement in the general arrangement. At the same time, we cannot approve of the division which von Klüber

makes, of the rights and obligations of nations, into those which are absolute, and those which are hypothetical. For no rights and obligations are altogether absolute ; but all bear a reference to other men, either individually or collectively, and their actions, prestations, or services ; or to external objects, or things, moveable or immovable. And the term hypothetical appears to be exceptionable, in so far as it implies any thing conjectural, or resembling a fiction ; because legal right and obligation can only be correctly deduced from actually existing circumstances. Neither do we see why the right of dominion and property of a state in its territory, should be separated from what is termed the absolute right of conservation ; or why, being almost an essential attribute, and involved in the idea, of every nation which has made even so little progress in civilization, as to be almost solely agricultural, it should be deemed a merely hypothetical right, and classed along with the rights of negotiation, and of binding other nations by treaty. Nor does there seem to be any good ground for denominating the rights of belligerents and neutrals hypothetical, or why they should not be considered, although not absolute, but correlative, equally actual, as the right of self-preservation.

At the close of our historical inquiry, how international law has been cultivated as a science, we gave a pretty full account of the contents of the work of Dr Julius Schmeling ; and took occasion to remark, that in his *Systematischer Grundriss des Practischen Europäischen Völkerrechts*, or systematic outlines of the practical European law of nations, nearly contemporary with, or a little posterior to, the work of Klüber, the

author has endeavoured to introduce a more methodical arrangement, than those adopted by his predecessors in detail, as well as general. But in this attempt, he has, we think, rather unfortunately employed the division of the Roman law, in matters of private right or jurisprudence, namely, the division into the doctrines of the rights of persons, of the rights of things, and of obligations and actions, as followed by the German jurists in their commentaries on, and illustrations of, that code. And, in arranging them according to this rather inapplicable division, we do not think he has, by any means, succeeded in elucidating or rendering more perspicuous, the doctrines of the law of nations.

The object of the author of the *Traité Complet de Diplomatie*, is obviously rather to convey instruction in the political art and practice of diplomacy, than to expound juridically the rules of international law. A great part of the work, however, is devoted to the latter subject, in the prosecution of which, he appears pretty much to adopt the views of von Martens, Schmalz, and Klüber. After a short introduction, the author in the first book undertakes to explain the origin and establishment of civil societies, the different forms of government, sovereignty, and the division of powers, the development of the physical and moral means of government, and in general, the internal organization of a state. In the second book, after considering the states of Europe in general, he explains what he calls the absolute rights of states; and under this head, it is rather singular, he treats of the administration of the different branches of government, and shows what in this respect one nation owes to others;

embracing the rights relative to commerce, and the duties and jurisdiction of commercial consuls, as well as separately, the personal relations of sovereigns to each other. He next in the third book, considers the rights which nations can only exercise in given circumstances, and which have a special origin ; denominating them conditional rights as Klüber had previously designated them, hypothetical. And under this head, like Klüber, he comprehends the property of the state, the means of acquiring it, the distinction of territory, the ocean and the maritime ceremonial. The fourth book treats of public conventions and treaties, their different kinds, their interpretation and execution ; of the written correspondence between states, and of the diplomatic style. In the fifth book, he treats of the right of negotiation and embassies, of the different orders of ministers, their privileges, functions, and jurisdiction, including the ceremonial of embassies. The sixth book contains the law of war, its causes and declaration, the different kinds of hostilities, the rules to be observed in carrying on war, prisoners, military operations, sieges, blockades, privateers, mode of treating with the enemy, and conquests. In the seventh book, on the law of neutrality, there is an analysis of the discussions on the maritime commerce of neutrals, contraband of war, the goods of enemies under a neutral flag, and of neutral goods under the flag of the enemy, visitation and search, the judgment of prizes. The eighth book contains the law of peace, the different modes of negotiating, congresses, preliminary, and definitive treaties of peace.

In this accumulation, or congeries of important

juridical matters, it is obvious there is scarcely any attempt at a scientific general arrangement; and we cannot approve of the division, which the author, following several previous jurists, makes, of the reciprocal rights and obligations of nations, into those which are absolute, and those which are conditional. For all rights and obligations are conditional, inasmuch as they pre-suppose and proceed upon facts, and actually existing juridical relations.

In his general arrangement of the constituent parts of international law, Dr Wheaton, as already observed, adopts the comparatively improved plan of Klüber. In part first, he treats of the sources of international law, and the subjects of international law, or sovereign states. In part second, he follows the example of Klüber, and of the author of the *Traité Complet de Diplomatie*, in dividing international rights into absolute and hypothetical or conditional; and treats of absolute international rights, under the heads of self-preservation, independence, equality and property. But, as we have already remarked, no rights are absolute in the correct sense of that term, or other than relative; and all rights are conditional, inasmuch as they pre-suppose certain states or circumstances, in which they arise, or exist. The better principle of division, therefore, appears to be duration or extent of prevalence, and state or condition. And agreeably to this principle, all international rights may be either permanent and general, such as sovereignty and independence, territorial dominion and property, self-preservation, and promotion of national welfare, equality and rank; or particular and occasional in

certain states; such as intercourse of nations in a state of peace, intercourse of nations in a state of war. Accordingly, in this view, Dr Wheaton very properly proceeds, to treat of the international rights of states in their pacific relations. But we do not consider the division of international pacific rights, into two separate classes; namely, right of legation, and right of negotiation and treaty, as, by any means, a happy one. It rather appears, that the right of negotiation includes legation, as one of the modes by which it is carried on, and exercised. And the better sub-division seems to be, into the right of negotiation by public ministers, and the right by public ministers, or otherwise, to enter into, and to conclude treaties, such as to bind other nations. In part fourth, Dr Wheaton treats of the international rights of states, in their hostile relations; under the separate heads, of the commencement of war, and its immediate effects; of the rights of war, as between enemies; of the rights of war, as to neutrals; and of the treaty of peace.



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## **CHAPTER V.**

**SKETCH OF A CLASSIFICATION OF THE COMPONENT  
PARTS OF INTERNATIONAL LAW.**

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## CHAPTER V.

### SKETCH OF A CLASSIFICATION OF THE COMPONENT PARTS OF INTERNATIONAL LAW.

FROM the preceding review, it rather appears, that with the exception of the treatise of Klüber, and of that of Dr Wheaton, as so far adopting his plan, even the latest and best treatises on international law, are defective in general scientific arrangement; and that even the general arrangement of Klüber is not altogether unexceptionable. But without here aiming at any arrangement or division, which may be physically and logically quite correct, we may adopt the principle of division, noticed near the end of last chapter; and remark, as the result of observation and experience, that some of the legal or juridical relations of nations appear to be general and common to most, if not to all nations, and comparatively permanent, if not perpetual; and that others appear to be particular, occasional, and existing only in certain states.

To the former class appear to belong the general and common attributes of nations, usually comprehended under the term independence; namely 1. Sovereignty and freedom from extraneous or foreign control. 2. Equality in point of legal right, with rank and precedence, conventional or consuetudinary. 3. Right of self-preservation, including territorial de-

minion and property, and right to maintain and promote the national welfare, consistently with the similar reciprocal rights of other nations.

To the latter class of particular and occasional relations, belong the ordinary state of peace, and the extraordinary, though too frequent, state of war.

While the reciprocal rights and obligations of nations, arising out of the general, common and permanent juridical relations of nations are observed, and the claims, pretensions, and controversies of nations are settled by compromise, mediation or arbitration, without physical force, or recourse to arms, we contemplate nations in their pacific relations. In this state, the chief juridical relations arise from the capacity or faculty of national intercourse ; which although it does not involve a compulsory right, and is not perpetually in operation, is common to most, if not all nations, and in frequent exercise. And this intercourse among nations, may be either in their corporate and political character, including negotiation, particularly by public ministers, ambassadors, and other political agents, and the conclusion of treaties, binding other nations ; or in their individual capacity, including commercial, and other intercourse among the individuals, of whom the different independent states, are composed.

When for the settlement of claims, disputes and controversies among nations, recourse is had to physical force, we contemplate nations, in their hostile or belligerent relations. And in this state, we have to consider ; 1st, the reciprocal rights and obligations of the belligerent nations towards each other, in resorting to, commencing, and carrying on war ; 2d, the reciprocal

rights and obligations in relation to each other, of the belligerent and other nations, with whom they are at peace—or neutral nations, with regard to their corporate, or their individual intercourse, but chiefly with regard to the latter ; 3d, the termination of the state of warfare, and restoration of peace.

## PART I.

### GENERAL PERMANENT LEGAL ATTRIBUTES OR RELATIONS OF NATIONS.

#### SECTION FIRST.

#### *Independent Sovereignty and Freedom from Foreign Control.*

The independent sovereignty of a nation appears mainly to consist in its immediate power of governing itself, according to its own laws, without the control or interference, in any respect, of any exterior greater or higher potentate on earth, whether in its ordinary legislative, administrative, judicial and executive functions, or in the formation or regulation of its internal institutions and establishments.

A people is either originally free, if it has hitherto recognised no other domination, or it has attained its independence through the cessation of its previous subjection to a higher power. Of the original formation of states, we have no satisfactory historical evidence ; and hence the diversity of opinion on the subject.

Almost all the sovereign nations in modern Europe have acquired their existence in the last mentioned mode.

A free state, which has acquired its independence, in a lawful manner, is entitled, in virtue of the natural equality of nations, to be recognised as such, by others. And in this, usually, no difficulty occurs. But the forcible temporary usurpation of the sovereignty is not sufficient to found independence, and cannot be viewed as altogether justified and lawful, until the former sovereign has voluntarily released from their allegiance, the inhabitants of that part of the national territory, who have withdrawn themselves from their former subjection, or has ultimately recognised their freedom, when compelled by force of arms. If such a nation be previously recognised and treated by other states, as independent, it is a circumstantial question, whether the nation from whom obedience has been withdrawn, be entitled to consider such recognition, as an injury. In general, no state is entitled to set itself up as a judge of the disputes between the government, and the subjects of other states ; and to declare the latter released from their former allegiance. At all events, such a recognition, by foreign nations, can in no way be prejudicial in point of right, to the former government, if it shall succeed in reducing the insurgents to obedience ; and such recognition can be of avail to the latter, only so long, as they are in a condition to maintain their asserted freedom.

## SECTION SECOND.

*Equality of Nations in point of Right ; Conventional and Consuetudinary Precedence in point of Rank.*

The independent sovereignty of nations almost necessarily implies and includes their original equality, in reciprocal rights and obligations. In general, no one nation can command another, or call another to account for its actions, or demand a preference or privilege over it. This equality is by no means lost by several nations entering into a joint confederacy. The smallest state is, in point of rightful independence, equal to the greatest sovereign.

In consequence of the complete equality among them, in point of right, it does not appear, that any precedence in point of rank, among independent states, can be deduced from observation of their nature as such. Yet the pride of nations has here sought, by various means, to obtain such a prerogative over others. The chief occasions on which this appears, are, the personal interviews of the rulers of independent states, as representing the whole nation, conferences of ambassadors, and other political agents, holding a representative character, written correspondence, and treaties, which are drawn up, in the names of several nations. At meetings of a number of individuals, it is no doubt quite natural, that a certain order should be observed, that one should be first, and so forth. But that order cannot conveniently be established and regu-



lated, consistently with the preservation of the natural equality, or without the concession of a privilege to one people. And it came to be a question, through whom, and according to what rule of preference, should this precedence of rank be determined.

Not content with natural equality, the European nations, because they found not in nature, the gratification of their vanity, had recourse to many adventitious, or accidentally acquired qualities in support of their claims to precedence.\* These were in general, the antiquity of their independent empire or realm, the antiquity of their family or house, the priority of their conversion to christianity, the power of a nation, the more excellent form of government, higher worth, or merit and title, illustrious deeds, obligations by treaty of support, protection and tribute, and incomplete sovereignty. But all these accidental qualities of nations merely afford an opportunity and ostensible reason for claiming precedence before others; they give no right. What is merely becoming or suitable, the reason frequently urged on such occasions, belongs not to the domain of the law of nations. These pretended reasons run so often counter to each other, that it is impossible any certain authoritative rules can be founded upon them. Sometimes the form of government may decide; sometimes, if it is changed, possession or power. And every state has at least, one of these qualities to exhibit.

In the absence, therefore of any rules furnished by

\* Günther *Europäisches Völkerrecht*. Erst. Buch, Cap. III. S. 198, &c.

nature on the subject, it is peculiarly requisite, that such a classification should be made, through a mutual understanding among nations. The only means consistent with justice, to secure for themselves the rank they desire, are, the stipulations of treaties, express or implied ; by which all the contests, almost necessarily arising from the maintenance of the pleas before mentioned, may be prevented, or put an end to. Some European nations have entered into such treaties with each other ; but down to the end of last century, the number of them was very small. The rest sought to establish the rank, they desired, by the assumption of it, and chiefly by acquiescence and tacit consent, and long possession and usage. Indeed, it is in this department of international law, that the influence of usage is most conspicuous, if not paramount. Happily, too, in more recent times the European nations appear to have sought to introduce, and establish for the future, the principle of natural equality among them. Gustavus Adolphus, of Sweden, was one of the first sovereigns who set this example. And with the exception of the mere title of emperor, which, instead of that of king, is still claimed by Austria, as the successor of the Roman emperor of the west, and was assumed by Russia in the early part of the 18th century, the different European powers, following the example just noticed, choose to be treated as equal to one another, crowned sovereigns taking the precedence of republican states. No positive definite rules, however, appear yet to have been established on this subject by general treaty. Towards the end of the year 1814, the plenipotentiaries of the eight powers, who signed

the treaty of peace of Paris, appointed a commission to investigate the principles to be established for the regulation of rank and precedence among crowns. And the projet of the commission went to establish three classes of powers, with reference to rank, among ministers. But, at the discussion of this projet, doubts having been raised with regard to this classification, particularly with reference to the class in which the great republics should be placed, the question was abandoned ; and the regulation adopted was confined to the rank of the diplomatic agents of crowned sovereigns.\*

### SECTION THIRD.

*Right of Self-preservation, and Right to Maintain and Promote the National Welfare, consistently with the similar reciprocal rights of other nations.*

THE general and permanent attribute of nations, denominated the right of self-preservation, may be viewed either negatively, as implying the right of defence and security against external aggression ; or positively, as the right of forming such institutions and establishments, and of adopting such measures generally, as may maintain and promote the national welfare and prosperity.

\* Klüber, *Droit des Gens Moderne de l'Europe*, Tom. I. § 94 ; and *Uebersicht der Diplom. Verhandlungen des Wiener Congresses*. p. 167.

## SUB-SECTION I.

*Negative Right of Defence, and Security.*

The right of defence and security against external aggression, it is obvious, comprehends not only the right to repel by physical force, actual invasion of territory, but the right to take such precautionary measures as may effectually frustrate, if not prevent such invasion.

As nations are, by nature, independent, and equal to each other, and no superiority in juridical relations takes place among them, it follows generally, that every sovereign people, has the right to regulate its actions, and the government of the state, in such manner, as it may think proper, without any other nation being entitled to interfere, or to call it to account, or to set itself up as a judge, or to demand an alteration of existing internal institutions. And it is a principle recognised by all free nations, from a regard to their own welfare, that no nation is bound to suffer such interference on the part of others, or to hold itself responsible to them for its conduct, or to receive from them any command or prohibition, or to submit to anything in the shape of punishment. But on the other hand, all nations are bound so to regulate their actions, as that the similar rights and liberties of the rest may not be thereby infringed, nor their social connexions disturbed. This freedom may also be limited by conventional treaties, and by estab-

lished customs. But any other restrictions appear to be unlawful. The stronger has no right to prescribe, or prohibit anything to be done by the weaker nation. And this does not usually happen directly. The weaker state, however, from dread of a more powerful neighbour, is often constrained to do, or omit, something, upon which it would have resolved otherwise, and to which, in strict law it would not have been bound.

In general then, no nation is entitled to interfere in the affairs of others, at least in the internal constitution, and administration of the state. To justify such interference, there must be existing treaties, or the request of both the parties interested, or the one nation must have a direct and substantial interest in the proceedings of the other; particularly some loss or damage to be apprehended from these proceedings. No nation, indeed, is bound to limit its freedom, for the profit or advantage of other nations, or to abandon, or discontinue an institution conducive to the prosperity of the state, because some advantage may be thereby withheld, or withdrawn from others, or some consequent future remote loss may be thereby occasioned to others. Yet according to the consuetudinary international law of modern Europe, any immediate damage to other nations, should, in such cases, be avoided, as much as possible, and everything removed, by which neighbouring nations may be kept in apprehension of danger, or disquiet.\*

So long as the actions of a people mainly concern merely the internal welfare of the state, other nations,

\* Günther, *Erster Theil* Cap. IV.

except in the cases just alluded to, have neither right to interpose their influence, nor occasion to trouble themselves. But if the arrangements, or preparations, of a people, bear immediate reference to the society of nations, of which it is a member, or are of such a nature, as to excite anxiety for the general tranquillity and security, other states are entitled to be watchful and on their guard, especially if the people adopting such measures, has already, by similar acts, given cause for distrust. These other nations, particularly those more immediately interested, are, by the natural and consuetudinary international law of modern Europe, fully entitled to demand an explanation, with regard to the object of such measures, and the removal of any ground for apprehension on account of them.

The conduct of no nation is liable to misconstruction, if it merely makes such arrangements, as are necessary for the maintenance of its internal tranquillity, and for its defence against external aggression. Nevertheless, under the more intimate social connexion of the European nations, and the consuetudinary international law, thence arising, a nation is bound not to overstep the probability of amicable views, by any unusual and suspicious military preparations, nor to excite apprehensions for their security in other nations; or it is bound to quiet them by a declaration, explanatory of the objects it has in view, and to remove the suspicion and distrust thereby created. Such offensive acts are usually held to be the following: the fortification of particular places, especially on the confines; the unusual levying of numerous forces, or the forma-

tion of large armies ; the march of troops, especially towards the borders ; the assembling of them in camps, occasionally used for military exercise ; the importation of warlike stores ; the establishment of magazines on the borders ; and, among maritime nations, the unexpected despatch of fleets.

But the question, whether the proceedings of one nation be really suspicious and dangerous for the security of other nations, must always be a circumstantial question. And for the farther illustration of this question, reference may be made to the work of Günther,\* as more satisfactory, than that of Vattel.

## SUB-SECTION II.

### *Positive Right of Melioration.*

So much for the right of conservation in a negative point of view, as involving defence, security against apprehended aggression, and the ordinary mode of requiring explanation, and adopting precautionary measures. We have next to contemplate the right of conservation in a more positive point of view, as involving the right of nations to maintain their existing state, to meliorate their condition, and to promote generally their welfare and prosperity. All nations, as well as individual men, have this right, and are entitled to use all means for the attainment of these

\* *Europäisches Völkerrecht, Erster Theil, Cap. IV. p. 280.*

ends, which are consistent with the exercise of the same, or similar reciprocal rights by other nations. No nation is entitled, in these respects, to restrain another, so long as the latter only employs such innoxious means.

Among the chief constituents of the welfare of a people, comprehended under the right of conservation, obviously are, the maintenance of the integrity of the territory of the nation, within its ascertained limits, as occupied by its population, to the exclusion of strangers or foreigners; the extension of that territory, so far as not detrimental to other nations, and particularly the colonization of distant, or transmarine uninhabited countries; the cultivation of its lands for the subsistence of its population, including the protection and encouragement of its agriculture, the protection and encouragement of its various manufactures, and the protection and encouragement of its inland, and also of its foreign commerce; and, generally speaking, no foreign nation has a right to oppose, any of these operations or enterprises. But the right of a nation to enlarge its territory, particularly the mother country, and otherwise aggrandize itself, like all other rights, is not absolute and indefinite, but relative and limited. In ascertaining its limits, the relative position and condition of surrounding, or adjacent, states, must be taken into view. And these other states, especially, if weaker, are entitled not only to repel actual aggression, as formerly observed, but also to enter into alliances with each other, and to adopt, in concert, precautionary measures, for preventing, or frustrating the injurious consequences of disproportion-



tionate aggrandizement. The existence and exercise of this right must always depend very much on special circumstances. But it rests generally on the right of defence. And the problem to be solved in such cases, is the reconciliation of the indisputable right of independence and security on the part of the surrounding or adjacent states, with the right of every nation to meliorate its condition. In the rude state of nations, and in the infancy of international law, the attention of states, is chiefly, if not solely directed to the prevention of legitimate states from being injured by actual invasion or conquest. But the more intimate social connexion, which, from a variety of causes, we have seen, has gradually arisen and taken place, among the European nations, requires such a limitation and moderation of the passions of sovereigns and nations for aggrandizement, as that the general tranquillity and security of this great society of civilized nations shall not be disturbed, either by the means to be employed, or by the power thereby acquired, to the ruin of other states. And nations have certainly the more cause to be on their guard in this respect, since the experience of all ages, ancient and modern, down to the present, proves, that, however little the mere accidental attribute of power, may legally warrant a claim of preference, or prerogative; the more powerful states, have nevertheless uniformly, under some plausible pretext, sought to exercise a sort of right of the stronger, and to aggrandize themselves, at the expense of the weaker. Hence the origin of the system of the balance of power among the European nations; and the resistance to the attempts at universal empire,

which have been made in Europe, from Charles V. to Napoleon. And although this system may have been sometimes perverted, and employed as a pretext for warlike aggression, experience seems to show, it has, upon the whole, been beneficial.

It has been maintained, indeed, that the system of the balance of power among the European nations, has no foundation in the natural law of nations. But, in this view, we cannot coincide. Among rude nations, certainly, who have no connexion from identity or similarity of race and language, of political institutions, and of religion, and have but little intercourse with each other, such foresight and extended views, and such concert in precautionary measures, as the system of the balance of power implies, are not to be looked for, and are not found. But when a number of nations, occupying contiguous, or nearly adjacent territories, have made such progress in civilization, are connected by such a variety of ties, and have such frequent intercourse, as the European nations have had, for several centuries past, the right of adopting precautionary measures, and of acting in concert for mutual or general protection, and security, arises as naturally, as the right of individual defence; and, though later in being introduced, equally forms a principle, and a part of the natural law of nations, without the aid of mere convention.

Klüber, no doubt, seems to hold, upon what grounds it does not distinctly appear, that the principle of the positive equilibrium of power, rests upon convention alone, (Tom. I. p. 75); and considers it desirable that the equivocal terms, "political equilibrium," should be

“banished from the language, both of politics, and of the law of nations.” But the opposite opinion, is ably, upon solid grounds, and satisfactorily supported and maintained, not only by the acute and profound Günther, in his *Europäisches Völkerrecht in Friedenzeiten, Erster Theil, Erster Buch, Fünftes capitel*; but also by Martens in his *Précis du Droit des Gens Moderne de l'Europe*, § 120, § 121, and by Schmalz in his *Europäisches Völkerrecht*, 206. And we beg to refer to those high authorities on international law; seeing farther details on this subject would be inconsistent with the design of the present mere sketch of a classification.

### SUB-SECTION III.

#### *Right of National Reputation or National Honour.*

Under this general right of conservation, although von Ompteda assigns it a separate chapter, may be included the right of a nation to the maintenance of its honour, character, and reputation—a right, which it is so difficult to define in the abstract; but which, in the concrete, and in the particular case, is so easily understood and felt, and the maintenance of which is so conducive to the security and prosperity of a nation.

## SUB-SECTION IV.

*Right of Necessity.*

Under the general rights of conservation, may also be included what has been called the *jus necessitatis*, the *casus gentis extraordinarius*, the *casus extremæ necessitatis*; under which, the more imperative right of self-preservation, may justify a nation in the non-fulfilment of an inferior legal obligation to another people; provided the former acts with great moderation and propriety, and indemnifies, as far as practicable, all such persons, as may have thereby suffered. Lampredi, *Jur. Publ. univ. Theorem. Tom. III. p. 143, P. III. Cap. VII. § 4.* Fichté *Grundlage des Naturrechts Th. II. § 65.* Kant *Metaphys. Anfangs-gründe des Rechtslehre, Einleitung S. XLVIII.* Klüber, Part II. Tit. L. § 44.

## PART II.

PARTICULAR AND OCCASIONAL LEGAL ATTRIBUTES, OR  
RELATIONS OF NATIONS, EXISTING ONLY IN CERTAIN  
STATES.

We have hitherto considered what appear to be the principal, general, and permanent legal relations of states, existing in all circumstances. We proceed briefly to notice the particular and occasional legal

relations of nations, which exist only in certain states, and which, as we have seen, may be distinguished into the amicable or pacific, and the hostile.

### SECTION FIRST.

#### *Pacific Relations of Nations.*

In their amicable relations, nations may have intercourse either in their collective or corporate capacity, as sovereign states, or in their individual capacity, through the members generally, of whom the state is composed.

#### SUB-SECTION I.

##### *Intercourse of Nations in their Collective or Corporate Character.*

Under this head of corporate national intercourse, although it relates to particular individuals, may be included the legal doctrine relative to the persons and families of sovereign princes, or monarchs, their births, marriages, and deaths; their mutual presents, their orders of rank and dignity, and the reception of foreign princes; all of which matters of right rest almost entirely upon custom and usage. But the chief rights arising out of this corporate national intercourse, are, the right of negotiation by public ministers, and the right of entering into treaties, and thereby legally binding other independent nations.

## ART. I.

*Right of Negotiating particularly by Public Ministers.*

The interest of independent states, requires that from time to time, they should enter into negotiations with each other, not only in order to prepare and conclude treaties, but also to watch over the legal and political relations, which subsist between or among them. And without attempting any more accurate arrangement, the following appear to be the chief subjects, which may be discussed, under this head.

1. The different modes of negotiation. 2. The right to send, and obligation to receive, public ministers. The right of choice, the appointment and recall of ambassadors and other diplomatic agents, their number, and the union of several missions. 3. The character of public ministers, as distinct from commissioners, deputies, political agents, and secret emissaries, as well as from commercial consuls. 4. The powers of, and instructions to, public ministers; their functions and occupations; the distinctions among public ministers with reference to the extent of their powers, the duration of their mission, and the nature of the business with which they are charged. 5. The rank or grade of public ministers; the different classes of ministers, ambassadors, and subordinate diplomatic agents. 6. The person of the minister, his suite, the secretary of legation, and other persons employed

by the embassy ; couriers, the family and the hotel of the ambassador. 7. The prerogatives or privilege of public ministers ; inviolability, extritoriality, immunity from taxation generally, exemption from the laws, civil and criminal jurisdiction, and police of the country, to which they are sent. 8. The jurisdiction of ambassadors and other ministers, and power of surveillance over their suite, the right of domestic worship. 9. The right of ceremonial, title and rank among themselves, at home and abroad, and in relation to third parties ; etiquette at audiences, and public solemnities, visits of ceremony, military honours. 10. Termination of diplomatic missions ; decease of the minister.

## ART. II.

### *Right of entering into and concluding Treaties, legally binding on other Independent Nations.*

Independent nations, it is plain, have the power of entering into contracts, as well as individuals, relying upon the observance of the principle of justice and general expediency,—*Pacta sunt servanda*. These contracts, or treaties, it is also manifest, may embrace the whole range of international actions, not only those, which are strictly legal, and may be enforced by physical means, without any treaty or agreement, but also those, which it may be morally right for a nation to perform, but which do not admit of being otherwise, or without such consent, enforced, consistently with

justice and general expediency ; and likewise those, which in point of moral rectitude, are of an indifferent nature. And, as independent states may renounce their rights, original or acquired, or limit them at pleasure, as well as undertake the performance of actions, which they cannot otherwise be compelled to perform, many actions which naturally are not so, may by paction, become legally susceptible of enforcement. But to constitute such a paction or treaty, and to create such a conventional obligation, there must be an acceptance of a proposal, a reciprocal consent, concerning the same object, distinctly and effectually declared, by words spoken or written, or by external actions ; for international law recognises no fictions.

Under this branch of international law, the following appear to be the principal subjects which may be properly treated ; corresponding to the doctrine of contracts, in the internal private law of states, or jurisprudence. 1. Conditions essential to the validity of a public treaty ; power of the persons acting, reciprocal and free consent, possibility of execution. 2. Inviolability of treaties. 3. The objects of public treaties and their different kinds ; special articles in treaties ; treaties of alliance in particular, alliances for peace and for war ; treaties of commerce concluded for the time of peace, or concluded for the time of war. 4. Operation and effects, and confirmation of treaties ; renewal and re-establishment of treaties. 5. Means of securing the execution of treaties ; pledge, hostages, guarantee. 6. Interposition and mediation of third powers ; concurrence and comprehension of third powers in treaties,



and their dissent and protest against treaties. 7. Interpretation of treaties. 8. Termination of the validity of treaties.

## SUB-SECTION II.

### *Intercourse of Nations in their Individual Capacity.*

The intercourse of the individuals composing different nations, is in modern times chiefly for the purposes of commerce, or for the exchange of superfluous or abundant commodities, either by a direct exchange of such commodities, the value of which is set off against each other, by bills of exchange, or through an intrinsically-valuable or metallic medium. But such intercourse also takes place, with a view to health, comfort, information, amusement and otherwise, with no reference to profit, from the exchange of commodities. And the latter, namely the intercourse of the individual persons composing different independent nations, simply as such, we shall first notice.

## ART. I.

### *Intercourse of Individuals of different Nations, simply as such.*

The exclusive rights of dominion and property, over, and to its own territory, would authorize the denial of entry, or passage to all foreigners, either by land or

sea. But, with respect to their European possessions, all the powers now generally accord to each other, in time of peace, the liberty of entry, passage and residence, as well by land as by sea, and upon most rivers ; subject of course to such conditions and regulations, as the security and internal tranquillity of the state may require. When once admitted into the territory of the state, and while resident there, a foreigner enjoys the protection of the law and of the government, in all the different departments of its administration. In return, he owes them obedience ; and the following are the principal subjects to be discussed under this head :—1. Subjection of resident foreigners to the legislative and judicial powers of the state in matters of civil right, and also in matters of preventive police. 2. Criminal jurisdiction over resident foreigners ; right and obligation to punish ; no right to claim surrender of alleged criminals, except by express treaty ; no criminal jurisdiction over foreign territory.

In the intercourse too, of different nations, in their amicable relations, expediency leads, *ex comitate gentium*, as it is called, to the recognition by the judicial tribunals of one state, of the laws of other foreign states, when the parties interested therein, resided abroad, or acted and transacted, or had their property situated in the territories of these foreign states, or under the laws of these states ; as in the laws of marriage, family, and kindred, succession, testate or intestate, contracts, insolvency and bankruptcy of debtors, and ranking of creditors, in cases where there is a *conflictus legum*. And it has been usual to treat under this head, as a branch of interna-

tional law, the effect thus given to the internal law of a nation, in foreign countries, and the effect given in one country to the sentences pronounced by the judicial tribunals of a foreign nation in matters of civil right, as discussed in the valuable works, *De Conflictu Legum* ; such as those of Hertius, Rodenburgh, Boullenois, Story, and Burge. But, upon investigation, it will, perhaps, be found, that the doctrines just alluded to, do not form a part of international law, strictly and properly so called. For they do not necessarily involve questions between the members of separate independent states, as such, but may arise, and frequently do occur, between members of the same nation, as well as of different nations. The questions treated in the works on the conflict of laws, no doubt originate in the differences in the laws of different nations. But they are raised chiefly by events taking place, and transactions being concluded in one country (such as decease intestate, and ordinary contracts), when the rights and obligations thence arising, must, in the circumstances, be enforced in another country; and such questions thus appear, rather to belong to the internal jurisprudence of nations, whose courts of justice can alone determine, what effect is to be given, within their jurisdiction, to the laws and judgments of the tribunals of other independent nations. The rules, indeed, which are gradually adopted by different nations, for the decision of such cases, are, from the similarity of circumstances, similar and common to a number of nations, and, like the law of maritime commerce, have thus come to be viewed, as a branch of international law, when, in

reality, they form a branch of the internal jurisprudence of a state; but, being of a general nature, and originating in similar circumstances, are adopted and established, in common, by almost all civilized nations.

## ART. II.

### *Intercourse of Nations in their Individual Capacity, for the Purposes of Commerce.*

But the chief source of the intercourse of nations in their individual capacity, is the exchange of commodities, of natural or artificial production. The territory of one state very rarely produces all that is requisite for the supply of the wants, for the use and enjoyment of its inhabitants. To a certain extent, one state generally abounds in what others want. A mutual exchange of superfluous commodities is thus reciprocally advantageous for both nations. And, as it is a moral duty in individuals to promote the welfare of their neighbour, it appears to be also the moral duty of a nation, not to refuse commerce with other nations, when that commerce is not hurtful to itself. But it belongs to each nation, in this matter, to judge for itself; and except the case of extreme necessity before noticed, a nation is not legally bound to sell its superfluities to any other nation, and still less to purchase from it, or exchange with it, the productions either of nature, or of art.

For we cannot agree, with M. Lampredi in his *Jur. Univ. Theorem.* p. III. Cap. IV. § 9, that “jus ad

commercia in genere est perfectum ; jus ad commercia in specie imperfectum." And this highly respectable author, has been led to this erroneous conclusion, by confounding a supposed right to carry on commerce with a foreign country, whether it will or not, with the right to carry on commerce with a foreign country, if it chooses, and of *not being prevented* from doing so, by any other foreign state ; in which alone, the liberty of commerce consists. There is no legal right, in any state, to compel another state to admit its inhabitants, or to receive its commodities, and give others in exchange, however great the inducements to maintain such an intercourse and traffic. But so great are the advantages, and so strong the inducements, that such intercourse with persons, and such exchange of commodities have taken place, and are likely to continue to take place, almost universally among nations. And whenever such an intercourse and exchange are permitted, there can be no doubt, of the legal obligation of the nation so permitting, to observe those rules of justice, reciprocity, and general expediency, which appear to be the foundation of the private civil internal law of states, or individual jurisprudence. The foreigners thus admitted are, of course, not entitled to the rights of citizens, nor to any general political or municipal privileges ; they are aliens, unless naturalized in the manner prescribed by the internal law of the particular state. But, even as aliens, they are entitled to the ordinary protection of person and property, afforded by the government to its own subjects, viewed merely in their relation to each other, as individuals. In the

history of the law, indeed, we even find, that such foreigners have frequently been allowed the privilege of being judged according to their own laws, and by judges of their own nation. Such an arrangement, however, is a matter of contract, or treaty; not of international right; each nation having the exclusive sovereignty and jurisdiction within its own territory.

In the same way foreigners have a right to protection in the disposal of the commodities allowed to be imported by them; subject to such duties and customs, and to such restrictions, as the government of the state may have judged it necessary, or expedient, to impose. And when admitted to trade, foreigners have also a right, along with the native inhabitants, and naturalized subjects, to the benefit of the two great internal establishments of civilized nations, connected with commerce; namely, to be placed on the same footing with subjects, with reference to the national coin, or money, and to have the free and safe use of the national post, for the conveyance of letters of correspondence and other mercantile documents. Farther, agreeably to the principles of international law, and under the express sanction of the *Droit des Gens Moderne de l'Europe*, there has come to be recognised, a power, in a sovereign state, to appoint and station public agents or functionaries, in the territories of other foreign states, to watch over the interests of the commerce carried on by their subjects, with the subjects of these other foreign states, under the appellation of consuls, in the modern sense of that term. Farther still, when there is established, or likely to be established, a direct and extensive traffic between two

nations, experience has shown the advantage of ascertaining and securing their reciprocal rights and obligations by treaties of commerce. The number of these treaties has greatly increased, since the middle of the 17th century; and they have been divided, into those, which concern commerce in time of peace; those which regard the rights of neutral commerce; those which refer to the case of a rupture; and those which fix the rights of consuls.

As the intercourse of nations in their individual capacity, for the purposes of commerce, or otherwise, is nearly as frequent by sea, as by land, the rights of nations relative to the use of the sea, fall under this division. And the subjects usually discussed, are:—1st. The right to the shore, including the now in Europe happily abolished right of shipwreck, and the right of salvage. 2d. The right over lakes, and seas nearly enclosed by land. 3d. The right to the free use of the oceans, and open seas. 4th. The maritime ceremonial.

But the object of our present inquiry, is merely the arrangement of the general component parts of international law. And any further details in the department just alluded to, we reserve for an historical view of the maritime law of nations.

## SECTION SECOND.

*Transition from a state of Peace to a state of War.  
Hostile Relations of Nations.*

HAVING thus enumerated and endeavoured to arrange in a natural order, not only the chief general permanent and common rights of nations in relation to each other, but also the chief particular and occasional rights of nations, we have to remark, that, while all these rights are observed, nations are said to be in a state of peace. But these rights are frequently violated, or attempted to be infringed. And the want of the compulsory power, which is exercised by the united community, against the offending individual, or individuals, in virtue of the internal organization of states, gradually effected in the progress of civil society, is grievously felt, and is, in international law, the great desideratum.

Even among nations, however, besides the perceptions and feelings of right and wrong, and of moral duty, which we hold to be applicable to men, in their collective, or national character, as well, as in their individual capacity, there arise, or exist, those considerations of self-interest, or prudence, which, although they do not call forth moral approbation, as being virtuous, exercise a great influence over mankind, as mentally and corporeally constituted, and as inhabitants of this earth. The considerations, to which we allude, are, indeed, the source, basis, and support of



that interior organization among a people, to which, under the title of *Gesetzgebung*, Professor Kant has ascribed the whole foundation of law. And, although we think, that view, in a great measure erroneous, the considerations, to which we allude, are certainly those, which, in the interior of states, have led, and lead, to the observance of the negative rules of justice by the great body of the people, and to those legislative and judicial establishments, by which those rules are physically enforced against the individuals, who dispute, and resist, or infringe them. These considerations, we enumerated in the earlier part of our *Inquiries in the Science of Law*, when endeavouring to mark the distinction between ethics and law. And it is unnecessary here to repeat them. But it is manifest from observation, and the experience of past ages, that, in the progress of civilization, and in the extended intercourse of nations, these considerations, which in the internal structure of communities, operate so powerfully and beneficially on individuals, exert also a salutary influence on the conduct of independent states and governments towards each other. The expectation of the benefits which arise from the continuance and cultivation of amicable relations with other states ; and the dread of suffering greater evils, from severe retaliation, or of provoking the general and united hostility of other nations, both tend to ensure the observance of the rules of international law, and to prevent the infringement of those rules, which long established usage has recognised and sanctioned. And under the influence of such considerations, there are several modes, by which the rights and obligations of

nations may be maintained, and their claims, or pretensions, and disputes, may be settled, without actual recourse to physical force.

One mode of such settlement appears to be by compromise, by mutual concession and amicable adjustment. Another mode appears to be by voluntary reparation of wrong, and concession. A third is the mediation of neutral and disinterested states. And a fourth mode, is by reference to the arbitration of one or more other independent states ; none of them recognising any human superior.

But when all these modes of adjustment fail, there is no alternative but recourse to physical force, directed against the whole, or any part of the offending nation, in vindication of the violated right ; and we therefore proceed to the other great class of particular and occasional legal relations among independent states, those of a state of hostility. And, as disputes among individuals united into one community or state, arising from actual or supposed, collisions of interests, are settled by litigation before, and unlawful aggressions are punished by, the judicial tribunals of a country, these hostile relations, originating in actual or supposed collisions of interest among nations, or in actual aggression, may be lawfully assumed, for the legitimate purposes of self-preservation, independence, resistance to aggression or control, or the prevention of one or more states, acquiring such a preponderance of power, as to endanger the liberty, or political existence of adjacent states. In this way, war is the ultimate mode of enforcing the rules of justice, reciprocity and general expediency among nations. And thus contem-

plating nations in a state of war, surrounded by, or in intercourse with, other nations at peace with them, we have to consider :—1st. The legal relations of the belligerent nations towards each other. 2d. The reciprocal rights and obligations of the belligerent and neutral nations. 3d. The termination of this extraordinary state of warfare, and restoration to the ordinary state of peace.

#### SUB-SECTION I.

##### *Rights and Obligations of Belligerent Nations between or among themselves.*

In arranging the reciprocal rights and obligations of belligerent nations, we may consider them first at the origin or commencement, and next in the prosecution of the war. Under the first head may be investigated :—1st. The right of war, and the conditions under which the exercise of the right is legally justifiable ; whether it belongs only to the sovereign power of a state, and the different kinds of war, defensive and offensive. 2d. The preliminary measures for vindicating the violated right, or accomplishing the object in view, or incipient warfare, *retorsio facti*, reprisals, arrest, and detention of persons or effects, embargo on vessels. 3d. Declaration or commencement of war ; its immediate effects ; orders by the belligerent governments to their subjects ; prohibiting intercourse with the enemy. Under the second head, may be investigated the legitimate mode of carrying on war, as justified by the principles of

reciprocity and general expediency, on which international law is founded, and as recognised in the practice of the European and other civilized nations—the lawful means of annoying the enemy ; 1. With regard to persons, the person and family of the hostile monarch or prince, or chief magistrate, ambassadors, subjects of the hostile government, unarmed people, armed force, prisoners of war ; 2. With regard to the territory and property, moveable effects, and other estate, and rights of the hostile nation ; foraging, carriages, requisitions, booty or prize money, conquests regained from the enemy, *jus postliminii*, validity of acts of government in a conquered country, after it has been re-conquered by its former sovereign ; pillage and devastation, privateers under letters of marque, pirates ; 3. Military operations, stratagems of war, scouts, refugees and deserters, combatants, troops, regular and irregular ; 4. Military aid by foreign powers ; general alliance, no separate peace ; partial aid, auxiliary troops, ships of war, subsidies ; 5. Conventions between belligerent powers, military arrangements, passports, safeguards, convention of neutrality, ransom and exchange of prisoners of war, exactions and contributions as ransom from pillage, cartels, capitulations, treaties of armistice or truce, general or particular.

## SUB-SECTION II.

*Reciprocal Rights and Obligations of Belligerent and Neutral Nations.*

If the disputes which have arisen among contending nations, be not settled amicably, or by recourse to the preliminary compulsory measures before referred to, these nations, we have seen, pass into a state of actual warfare ; and this state affects not merely themselves, but likewise other nations adjacent to, or connected with, or having intercourse with them.

In contemplating the reciprocal rights and obligations of belligerent and neutral nations in relation to each other, the legal doctrines may be comprehended under the following heads :—1st. The right of neutrality ; neutrality natural and voluntary, or conventional and obligatory, entire and complete, or limited, general or partial, armed, continental and maritime ; 2d. General obligations of belligerent powers towards neutrals, and of neutral powers towards belligerents ; 3d. Rights of neutral states in relation to belligerents, in neutral territory, in the country of the enemy, in relation to commerce ; 4th. Conveyance of merchandise and goods generally by neutrals to the enemy, warlike stores, contraband of war ; 5th. Rights and obligations of belligerents and neutrals in maritime commerce, visitation and search of neutral merchant vessels, procedure relative to maritime prizes, competent judicial tribunals in prize causes ; commerce, with blockaded ports ; rules

actually observed with regard to hostile goods in neutral vessels, and neutral goods in hostile vessels; 6th. Conventional system of armed neutrality for the protection of the neutral flag, its principles and progress, superseded by new conventions, adopted anew, and a second time abandoned; 7th. Farther restrictions on neutral maritime commerce, in the long struggle and contest between Great Britain and France; French continental system; British extended system of blockade; cessation of both these systems.

The interesting doctrines here merely enumerated, in exposition of a classification of the constituent parts of international law as a whole, we may perhaps have an opportunity of illustrating in a historical view of the maritime law of nations.

### SUB-SECTION III.

#### *Termination of Hostile Relations, and of the Extraordinary and Temporary state of War, and Re-establishment of the Ordinary state of Peace.*

When the enforcement of the violated right, or reparation for that violation; when the objects of the defensive or offensive war have been attained, or so far attained, or have been found practically unattainable; and when the strength of the belligerents has been considerably exhausted, the inducements to prosecute hostilities in a great measure cease; and there arises a desire, frequently on both sides, to return to the happier state of peace. The legal doctrine on this

head, may be arranged as follows :—Approach to reconciliation ; preparatory negotiations with a view to peace, by means of a congress, or otherwise ; mode of negotiating at a congress, or between court and court ; preliminary and definitive treaty of peace ; signature of treaty ; separate articles ; general, common, and joint, or principal and accessory treaties of peace ; form of accession ; guarantee of treaties ; validity, interpretation and execution of treaties of peace ; contemplated perpetual peace, and tribunal of nations.

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## CONCLUSION.

Such seem to be, if not the whole component parts, as ascertained by an exhaustive logical analysis, at least, the principal component parts of international law, as ascertained from observation and experience, and arranged in an order, which observation and experience suggest as natural. And we may conclude with repeating, that these component parts, taken as a whole, constitute, in combination, the natural and positive law of nations.

Under the former of these denominations, are comprehended, those juridical relations, and consequent rules of conduct, between, or among, the assemblages of men, occupying particular portions of this globe as territory, united in domestic and civil society, under one government, and forming states, independent of

each other ; which relations and rules, if not antecedent to all human legislation, arise from the physical and mental constitution of mankind, and the circumstances in which they are placed, and exist independently of the acts of men ; and which, if not intuitively perceived, or immediately felt, are actually perceived and felt, in the course of experience, and admit of being enforced, consistently with justice, individual reciprocity, and general, if not universal, expediency.

Under the latter denomination of positive are comprehended the rules of international conduct which have been actually recognised by nations, and adopted in practice. And this recognition and adoption may be either virtually *rebus et factis*, by established custom and usage, or *totidem verbis*, by express paction or treaty.

Under either of these modes of recognition and adoption there may be comprehended—first, and chiefly, the rules of natural international law, before described ; secondly, modifications of, and sometimes departures from, these rules ; thirdly, rules of national conduct, which may not properly fall under the rules of natural international law, but which, in the course of experience, though otherwise indifferent, it has been found beneficial or convenient to fix in one way, and to recognise and adopt.

As the stipulations in treaties usually relate to a certain number of points, and are generally similar, the conventional law of nations as a whole admits of systematic arrangement, and is clearly binding on the contracting parties. But beyond the contracting parties



it does not appear to have any obligatory force, or to warrant compulsion, farther than as it may show or prove what were the other rules adopted by nations generally, apart from, and independently of, special treaty; or that other nations, not contracting parties, have long acquiesced in, or acted upon, the rules recognised in the treaty, without any counter stipulations and considerations.

**FARTHER INQUIRIES**  
**IN**  
**INTERNATIONAL LAW.**

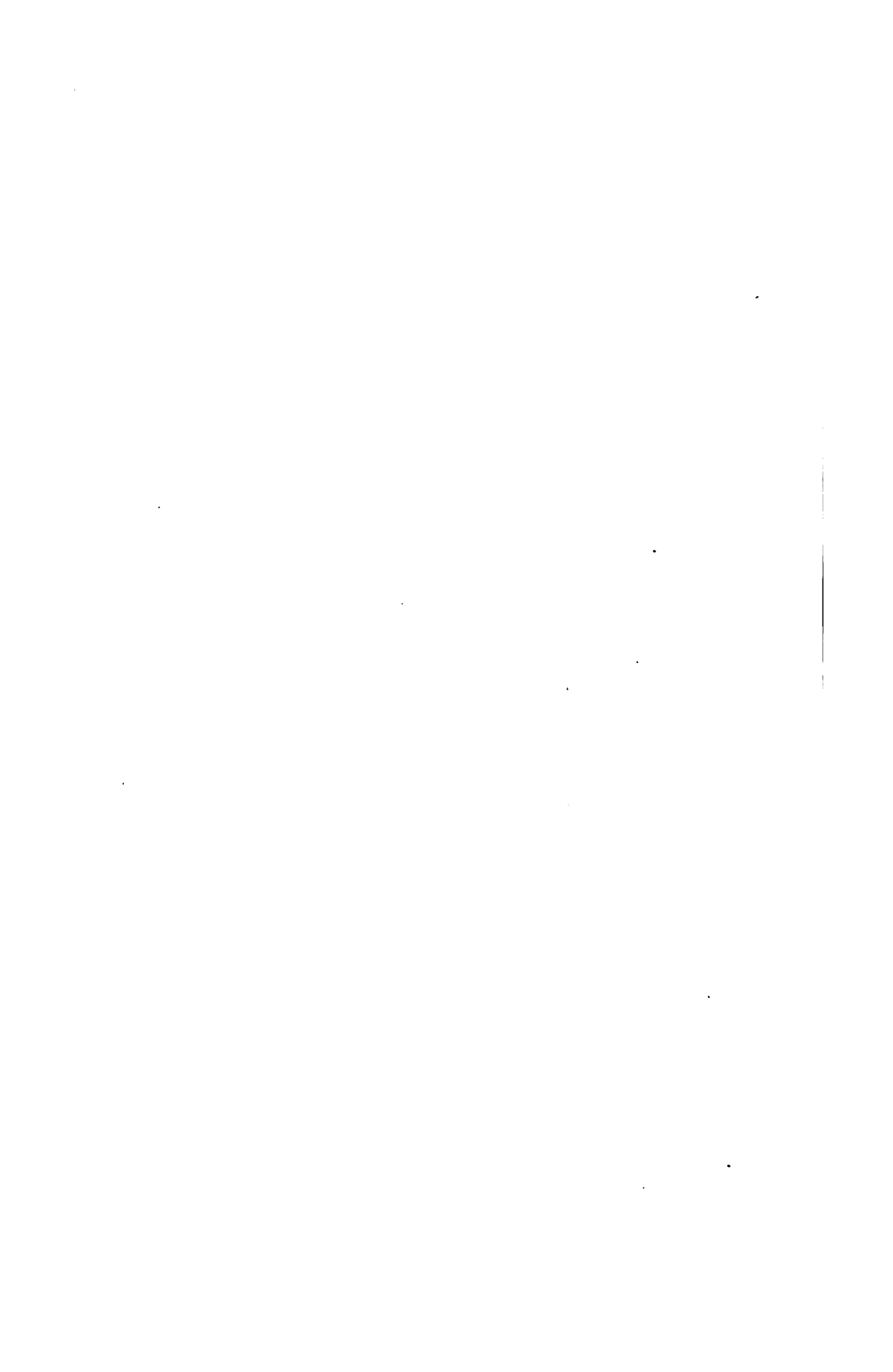
**PART FIRST.**

**OF PUBLIC INTERNATIONAL LAW, OR OF THE LAW  
OF NATIONS IN THEIR INTERCOURSE IN THEIR  
COLLECTIVE OR CORPORATE CHARACTER.**



## **CHAPTER I.**

**FARTHER ILLUSTRATIONS OF THE CULTIVATION OF PUBLIC  
INTERNATIONAL LAW.**



## CHAPTER I.

### FARTHER ILLUSTRATIONS OF THE CULTIVATION OF PUBLIC INTERNATIONAL LAW.

It is rather singular that the English people, or that portion of the population who have been legislators, or who have practised the art or cultivated the science of law, while they made truly great and successful exertions for the establishment and improvement of their internal institutions, their public or constitutional law, and their private civil and criminal law for the administration of justice among individuals, should comparatively have paid so little attention to the Law of Nations, or what has been recently denominated International Law, embracing the external juridical relations, the reciprocal legal rights and obligations of separate independent states.

In their public or constitutional law, the English people appear to have hitherto excelled all the other nations of modern Europe ; and are justly entitled to be proud, especially in the present times, of their constitution, which, whether it be termed a limited monarchy or an aristocratic republic, exhibits a system of regulated liberty, reared on a popular basis, and firm in the steady attachment of the great body of the people ; and, though defective in many respects, as all human institutions have been, and seem destined to be, yet possessing in itself the means of correcting abuses, and of self-improvement.

Whether the English people have been equally successful in the formation of their criminal and private civil law, is perhaps a more doubtful question. Some eminently learned and able foreigners, who on other occasions have shown their impartiality and discernment, have remarked that England is "*fière de ses vieilles coutumes, et dédaigneuse de toute forme étrangère*;" and with regard to English lawyers, that "*la loi n'est pour eux, qu'une profession.*" But without stopping here to inquire whether there be any truth in such remarks, the great attention paid by the English people to their internal criminal law, and private civil jurisprudence, is sufficiently apparent from the voluminous statutes enacted from time to time by the legislature, and from the gradual formation of their now very extensive and complicated systems of common law and equity; in the construction of which the English judges and lawyers adopted a different and perhaps more independent course than that pursued by the Continental nations, and rejecting, from an early period, (shall we say from the fifteenth century?) the aid of Roman experience, as exhibited in the remains of the works of the unquestionably great lawyers of that wonderful people, resolved of themselves to evolve and deduce, from the juridical experience of the nation itself, the rules and principles of its internal jurisprudence.

To the devotion of such high talents and acute discernment, and of so much learning and industry to the formation, not merely of the constitutional law, but also of the systems of common law and equity, the omission and neglect of the English lawyers to cultivate international law, as a science, (as we shall see more fully in

the sequel,) forms a striking contrast. It does not appear that any systematic course of preparatory education was ever either provided by the state, or even required by Government, for the individuals who were to be employed to carry on the international and diplomatic agency and business of the English or British people. And to these causes, perhaps, are to be attributed, as consequences, the fact of England having had so few able negotiators, and the trite, though perhaps too true, observation, that Britain has frequently lost by the pen what she had gained by the sword; or lost, by her unskilful negotiation, advantages which she had fairly and honourably acquired in the course of her zealous exertions for the maintenance of the independence of nations, and in virtue of her military and naval skill and prowess: thus exhibiting an example of proud disinterestedness, not called for even as a moral or ethical duty, and not perhaps consistent with practical wisdom, or the general interests of mankind.\*

In these circumstances we may again take a cursory view of international law generally,—noticing the mode of its cultivation, tracing its origin and development, and endeavouring to ascertain its basis and fundamental principles, contemplating it in its two great component parts—common consuetudinary law, and conventional law, marking their characteristic and distinctive attributes. In these discussions we shall, of course, reject all legal fictions—all suppositions of social contracts, which never did, nor perhaps could, take place, and other such hypothetical theories; and we shall endeavour to proceed solely upon observation and experience, adhering to that

\* What sacrifices were uselessly made by Great Britain at the general peace of 1815, such as the cession of Java to the Dutch!



mode of inductive reasoning which has been so successfully employed in the material sciences, such as mechanics, astronomy, and chemistry. We now propose to contemplate generally the reciprocal rights and obligations of nations, in their collective or corporate capacity, and in their more public intercourse, forming what has been called by the French, "*Droit Public Externe*."

### *I. Of the Cultivation of International Law generally.*

The earliest attempts, in modern times, to discuss scientifically the Law of Nature and Nations, appear to have been made towards the close of what are called the Middle Ages, and are to be found in the writings of certain Italian and Spanish theologians, such as Vasquez and Suarez. But for an account of these authors, which is now merely a matter of curiosity, and for an interesting view of the leading causes which concurred in modifying and improving the law of nations in modern Europe, we may refer the English reader to Mr Plumer Ward's *History of the Law of Nations prior to the Age of Grotius*, published in 1795.

Of Grotius, the celebrated father of the Law of Nations, as he is usually called, it would here be superfluous to say anything, after the able and full discussion of the merits of that illustrious man, and of the influence his writings had upon the literature of modern Europe, with which Mr Hallam, some years ago, favoured the British public.

Pufendorff, it is well known, followed Grotius; and his writings also had great influence on the age in which

he lived. But they did not tend much to promote the advancement of the law of nations, to which he denied the rank of a separate science ; including it, in a vague and indefinite manner, under the general morality, or ethics, of individuals and nations. This erroneous view was corrected by Rachel in the seventeenth century ; but Christian Thomasius, having adopted the view of Pufendorf, by his talents and learning rendered it triumphant for a time in Germany ; and it was not till the eighteenth century that a more precise and correct notion of international law came to be generally entertained.

Leibnitz, among the multifarious labours of his comprehensive genius, besides suggesting the great advantage of preserving a record, and of making collections, from time to time, of the Treaties concluded between the different European nations, and of other state or diplomatic documents ; and setting an example in the compilation of his *Codex Juris Gentium Diplomaticus*, gave, in his preface to that work, a very distinct exposition of the basis of what he termed "Jus Feciale inter Gentes." His follower, however, if not pupil, Baron von Wolff, although distinguished for his vast learning and his methodical and voluminous treatment of the law of nature and nations, was not happy in his mode of prosecuting and developing the enlarged and philosophical views of Leibnitz. But, availing himself of the learned labours of Wolff, Vattel soon afterwards reduced them in bulk, moulded them into a neater and more popular shape, made some practical additions, and thereby attained a degree of celebrity equal to, if not greater than, his merits.

In his work, entitled *Le Droit des Gens*, Vattel has

introduced a good deal of what appears to be rather extraneous matter — namely, treatises on the internal public and private law of states, as well as on international law, properly so called, or, as the French now term it, “*Droit Public Externe*.” And how his celebrity should have been so much greater than that of Wolff, in Britain as well as on the Continent, it is not easy to see ; except from Vattel having endeavoured to clothe the doctrines in a lighter, more agreeable, and attractive dress, and from the subject not having been previously much attended to in England. But, from whatever cause, such was the fact. The work was lauded by several eminent statesmen in Parliament ; was translated into English ; and seems, in Britain, for upwards of half a century, to have been held and appealed to as the standard more modern work on the law of nations.

With regard, again, to the internal cultivation of the law of nations in Britain, England, although not entitled to claim him as a native, might boast of the great learning, and, for his age, acute and extended views of the Italian, Albericus Gentilis, inasmuch as he was Professor of the Law of Nations in the University of Oxford, and apparently an eminent practical lawyer in matters of maritime right, as well as a distinguished theoretical international jurist.

It is, perhaps, to be regretted that Selden devoted his great learning and talents to the support of some extravagant claims, in behalf of England, to the exclusive dominion of certain adjacent seas — such extravagant claims as Venice, Genoa, Spain, Portugal, and Holland had previously urged. For it does not appear that any such exclusive claims were ever practically exacted, or

attempted to be enforced by England. And the argument maintained by Selden in support of such claims, whether in order to please a despotically inclined monarch or not, has all along afforded, and even very lately, an opportunity and excuse for foreign jurists to declaim against what they call the unjust maritime pretensions of this country.\*

Indeed, so far as regards international law, England has much less to be proud of Selden than of Dr Richard Zouch, (Zouchæus,) who, about the middle of the seventeenth century, was Professor of Law at Oxford, and afterwards Judge of the High Court of Admiralty, but to whose reputation, as an author, justice does not appear to have been done in his own country at all corresponding to his merits; and with him ended, for the seventeenth century, the cultivation in England of international law, with the exception of the memorials and opinions of Sir Leoline Jenkins, in the reign of Charles II., chiefly on the maritime department of international law; for the excellent work of Molloy, in 1682, treats almost solely of the private law of maritime commerce.

In the eighteenth century, with the exception of the admirable answers by Sir Dudley Ryder and Mr Solicitor-General Murray, afterwards Lord Mansfield, to the Prussian manifesto relative to maritime prize law, no work appeared on the law of nations generally, till the publication, about the middle of last century, by Dr Rutherford of Oxford, of his lectures, or commentaries on the work of Grotius *De Jure Belli*; and during the

\* Rayneval, *De la Liberté des Mers*, 1811, vol. i.

remainder of the eighteenth century, no work appeared on the science generally of international law. For the excellent pamphlet of Jenkinson, (Lord Liverpool,) and the admirable judgments of Sir William Scott, (Lord Stowell,) as reported by Sir Christopher Robinson and other learned jurists, related almost entirely to the law of maritime captures as prize ; while the truly excellent work of Abbot, (Lord Tenterden,) like the work of Molloy about a century before, embraces solely the private law of maritime commerce.

Although a learned and sensible work, the lectures of Dr Rutherford do not appear to have exercised much influence on the national mind of England, and seem to have been very much superseded by the translated work of Vattel, which, as formerly mentioned, still continues to be referred to in this country as a standard international law authority of the first order.

To return to the Continent : some time after the publication of the work of Vattel, the mode of cultivating international law appears to have undergone a considerable change in Germany. The example which Leibnitz had exhibited in the compilation of his *Codex Diplomaticus* had been followed ; and various voluminous collections of treaties and other state papers had been printed, not merely in Germany, but chiefly in Holland, and also in England, such as the collections of Dumont, Rousset, Rymer, and others. In these collections the chronological order was followed, without much attempt at a more methodical or systematic arrangement, until it seems to have occurred to the ingenious Abbé de Mably that a *Droit Public de l'Europe* might be "fondé sur les Traités."

About this time also the less ingenious but more industrious and learned German writers, Meister, Moser, and others, found it a more easy task to collect and arrange methodically the various stipulations and other provisions, which had usually occurred in the multitude of treaties concluded between the different European nations in the course of the two preceding centuries, than to evolve, unfold, or develop scientifically in detail, the fundamental principles of international law. The liberality of the British King, George II., to his native hereditary dominions, enabled the University of Göttingen, which he had founded, to accumulate a most extensive and valuable library. And availing himself of this resource, the very learned and indefatigably industrious G. F. Von Martens, besides his *Traité des Prises*, his *Cours Diplomatique*, and his collection of Treaties from 1761 to the present times—published in Latin in 1784, republished in a more complete form in French in 1789 and 1801, and finally published in 1821 a third edition of his work, entitled *Précis du Droit des Gens Moderne de l'Europe, fondé sur les Traités et l'Usage*.

In this way, certainly, the law of nations was advanced and improved, inasmuch as it was thereby rendered more practical, by the methodical arrangement of the usual stipulations in treaties, which, of course, while they lasted, independent states were bound to observe as special bargains, and to consult and be guided by in the first instance. But while this no doubt useful labour was going forward, the cultivation of international law as a science, the investigation of the reciprocal rights and obligations of nations, which exist independently of special compact, was neglected. This error or defect

was perceived, admitted, and attempted to be corrected, by the able Baron Von Ompteda, in his both learned and scientific work entitled *Literatur des Gesammten sowohl Natürlichen als Positiven Völkerrechts*; or, "Literature of the United Law of Nations, Natural, as well as Positive or Established." These views of Von Ompteda were quite consistent with the truly philosophic views of Leibnitz. But the views of Meister and Moser, as well as those of Mably, Martens, and Klüber, appear to have been either narrow and unscientific, or fanciful and unfounded. According to the views of the two former, and their followers, international law no longer deserved the appellation of a science, but was degraded and reduced to the methodical arrangement of the points embraced in the stipulations and provisions that had been usually inserted in the treaties which had been concluded between the different European nations for two or three centuries past. "Moser," says the Prussian privy councillor and lawyer, M. Schmalz, "has neglected the philosophical exposition of historical fact, and the discovery or development of general principles, which might at once satisfy reason, and the views and practice of common life." But Mably, and particularly Martens and Klüber, appear to have been aware this objection was too well founded; and, therefore, continuing the form or shape of the science as it had been fashioned by Grotius, Rachel, Wolff, and Vattel, exhibiting the state of general or common consuetudinary international law, as it existed independent of negotiation, special bargain, or treaty, they confusedly mixed it up with particular or conventional international law, resting solely on treaties; and by the introduction of what they called the principle

of analogy, endeavoured to form an imaginary inferential theory or system, suited to particular national views and interests.

That the particular or conventional law of nations, founded on treaties, is in many respects highly useful, and has an existence as real, and a force as binding or obligatory, as the general or common consuetudinary law of nations, which exists without treaties, there can be no doubt. But the operation and legal effect of these treaties are confined to the contracting parties ; they are to be liberally interpreted, but according to the legal construction of the terms employed ; and they are limited in point of duration, so far as regards the future, by the lapse of the specified period, by the complete fulfilment of the stipulated engagements, or by the occurrence of events by which they are legally extinguished, and cease to be obligatory, unless expressly renewed. They are, no doubt, to be consulted by the diplomatist in the first place, and complied with by the state or government, but simply because they are special bargains, creating particular rights, or imposing particular obligations, which would not otherwise exist at common law, or to the same effect ; just as contracts or bargains between individuals in private life are usually entered into—not to alter the common law, but to create rights and obligations which would not otherwise have any existence. But not content with this priority in point of authority, consultation, and execution, thus conceded or justly belonging to conventional international law, or to treaties, as special bargains, some of the recent German jurists, as Martens and Klüber, and also the Anglo-American lawyer, Dr Wheaton, apparently endeavour,



by the introduction of their principle of Analogy, as they call it, to found upon, or extract from, treaties, a kind of general (not particular) conventional law, creating rights and obligations, in favour of some nations and adverse to others, beyond the contracting parties, and beyond the existence and limits of these treaties, either in extent or duration.

To this subject we shall revert in the course of our observations; in the mean time we shall merely notice shortly the still later foreign writers on International Law than those before mentioned.

After the death of M. G. F. Martens, a still further edition of his work appears to have been procured at Paris in 1831 by M. Pinheiro-Ferreira, the Portuguese ex-Minister for Foreign Affairs, in order that he might subjoin to the work of Martens his own notes or commentaries, which are written in, certainly, an unnecessarily caustic and unhandsome style, but are frequently acute, and point out errors into which M. Martens had clearly fallen. M. Pinheiro-Ferreira had previously published in 1830 his *Cours de Droit Public Interne et Externe*, a work of considerable merit.

In 1839, Mr Oke Manning, junior, published his respectable work, entitled *Commentaries on the Law of Nations*.

In 1845, M. Th. Ortolan, who appears to be a *protégé* of M. Dupin, published an interesting work, entitled *Règles Internationales de la Mer*, some of the general doctrines of which we may have occasion to examine.

The Anglo-American lawyer, Dr Wheaton, has this year published, at Leipsic and Paris, another edition,

revised and enlarged, of his valuable work, entitled *Elements of International Law*, in the French language.

In 1845, M. Oppenheim of Heidelberg published a *System des Völkerrechts*, embracing private as well as public international law—a short popular work, addressed by the author to the public, yet of some pretensions, as systematic, and written avowedly more for jurists and students than for diplomatists.

But of all the recent foreign writers on international law, whether German, French, or Portuguese, the most correct, concise, truthful, and impartial, is Professor Heffter, of the University of Berlin, in his treatise entitled "*Das Europäische Völkerrecht der Gegenwart*"—"The European Law of Nations in its Present State ;" which treatise he had undertaken to compose, jointly with the celebrated M. Gans, but of which, in consequence of the premature death of that distinguished author, he had to write the whole, and which he completed and published so recently as 1844.

We shall next proceed to trace the origin or sources and development of international law, to endeavour to ascertain its basis or fundamental principles, and ultimately to contemplate its great component parts, and mark their distinctive characters.

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## **CHAPTER II.**

**FARTHER ILLUSTRATIONS OF THE SOURCES AND DEVELOPMENT OF PUBLIC INTERNATIONAL LAW.**

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## CHAPTER II.

### FARTHER ILLUSTRATIONS OF THE SOURCES AND DEVELOPMENT OF PUBLIC INTERNATIONAL LAW.

IN prosecuting our inquiries in International Law, we do not embrace the rules of general morality or ethics, by which the conduct of mankind, whether as individuals or as nations, may or ought to be governed. We confine our investigation entirely to the rules of coercive or compulsory justice,—to the juridical or legal relations of nations,—to those rules for the conduct of nations to each other, of which the observance may, in consistency with the principles of justice, reciprocity, and general expediency, be compelled by physical force.

Some ingenious and acute Continental, particularly German, philosophers and lawyers, however, dispute the distinction here made, and deny the existence of any law of nations properly so called—that is, coercive or compulsory law, or of anything more than the morality or ethics of nations; because separate independent nations have no superior on earth to whom they are responsible or amenable; because they acknowledge no supreme legislative power, and have, in relation to each other, no Gesetzgebung, no legislative enactments, and no guarantee, or means of enforcing such enactments. But the conclusion here deduced does not appear to us, by any means, to follow from the premises. It is quite true

that, according to the arrangement which the omnipotent and all-wise Creator has established on this earth, separate and independent states, or men congregated into communities, living in civil society, under a government, and occupying a definite territory, have no superior on this globe, are not subject to any supreme power, legislative or executive and administrative, and do not externally possess over, or in relation to each other, those sanctions, guarantees, or means of enforcement which internally the united power of the great majority of the nation or community, the state or government, possesses over its citizens or subjects. But it is equally true that, by the arrangement which He has made in this physical material, and physical mental world, the omnipotent and all-wise Creator has established certain laws, most of which men must obey, many of which they may transgress, but not with impunity; and to which laws generally their welfare, even in the present life, requires them to conform, in the exercise of the delegated power conferred on them. Mankind, considered in their collective capacity as nations, communities, or states, as well as in their individual capacity, are manifestly capable of rights which they are entitled to enforce, and susceptible of obligations which they are bound to perform or fulfil. Nor are these national rights and obligations left entirely without the means of compulsory enforcement: with regard to these means, sometimes denominated, though not very correctly, guarantees or sanctions, there is no doubt a considerable difference between external or international law, and the internal public or constitutional law, and the internal private jurisprudence of states. The guarantees or sanctions of international law are

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more slender, more feeble, than those of public or constitutional law, and much more insecure than those of internal private law. But this difference does not affect or alter the essence or nature of the right or law. It is, in a great measure, the consequence of the less advanced state of the cultivation of the juridical relations of nations, which might obviously be greatly promoted by the establishment of proper and improved tribunals or courts of international law, judiciously constructed, and wisely and impartially directed or conducted, in a similar way to that in which internally, in states, the common consuetudinary law is improved and matured. The want of such more powerful guarantees or sanctions, as belong to internal private civil law, or to the internal criminal law of states, does not at all take from the fundamental rules of international law their character of judicial or legal principles. And beside war, the last to be resorted to, of the means of enforcing it, the law of nations, like the internal civil and criminal law of states, has sanctions or guarantees, partly in the reciprocal interests and in the reciprocal fears of states and governments, partly in the political alliances of the weaker with the more powerful nations, or in the maintenance of national independence, through the balance of power.

Farther, in prosecuting our inquiries into the law of nations, thus limited and defined, we do not assume or proceed upon any fictitious data, or any imaginary compact among all nations, or, at least, all civilised nations, which never existed, and perhaps could not exist, or upon any supposed antecedent state of nature, whether of war or of peace, such as the hypotheses of Hobbes and Rousseau. We endeavour to ascertain international



law, only so far as it can be ascertained by observation and experience—by observation of the existing nations of the present age, and by contemplation of the nations which have existed in past ages, as represented in the authentic records of history. We do not aim at any other mode of investigation than what has been attended with so great success in the external physical material world, in the cultivation of what have been termed the inductive sciences. We do not pretend, by abstraction and new combinations of ideas, or any other merely intellectual operation, to ascertain all the juridical or legal relations which may possibly exist among nations, in regard to each other. We are content with endeavouring to ascertain those juridical or legal relations—those mutual rights and obligations—which have been almost intuitively perceived or apprehended, or logically deduced from premises thus founded on fact, and which have been recognised by civilised nations in their actual practice. Our object, in short, is the more accurate ascertainment of that international law which the later German jurists, and after them the French, have denominated *positif*, as different from what was previously called natural; the appellation *positif* apparently corresponding to our English appellation established—in other words, recognised and acted upon, by nations in their intercourse with each other.

But while we thus do not expound international law, as founded on any universal or general simultaneous compact or agreement among all nations, or all civilised nations, and do not engage in a vain search for such a compact, we entertain no doubt of the existence of such a law as before described, as binding upon nations, as

flowing from other sources, besides general or particular national consent or convention, and as having been, to a considerable extent, recognised in practice, and established among the civilised nations of Europe, and those who have emanated from them, and now occupy the American or other continents. Indeed, we cannot contemplate the physical material and the physical mental world, which this earth and its inhabitants exhibit, without clearly discovering that there are sources of right and obligation anterior and superior to any which human consent or human law can create.

*Sources of International Law.*

Like the internal common private law of states, the external common law of nations, it is manifest, must ultimately rest upon and be conformable to the laws which the omnipotent and all-wise Creator has established for the regulation of this portion of the universe, which constitutes to mankind what we call the physical and moral, or, more correctly perhaps, the material and mental world, in which they are placed. And if, guided by observation and experience, we pass from the contemplation of individuals, living together in civil society, to the contemplation of such individuals, so associated and congregated, as constituting so many separate communities or states, we find that among the latter also, as among the former, certain juridical or legal relations exist, or arise, in certain circumstances, anterior to, and independent of, any exercise of the national will: either internally, in legislative enactment and executive admini-

nistration ; or externally, in acts either uni-lateral, without any joint consent, or bi-lateral, involving the consent of others, such as conventions or treaties. And many, if not most, of these juridical or legal relations, and the concomitant or consequent rights and obligations, are simple and obvious, and are almost intuitively perceived or apprehended, and almost instinctively felt, by the ordinary population generally of whom states are composed. They come to exist in the consciousness or conviction of the people, just in the same manner in which M. de Savigny shows the private rights and obligations of individuals living in civil society are unfolded in the gradual progress of the internal jurisprudence of states.

Farther, if, prosecuting our investigations under the guidance of observation and experience, we contemplate the external relations of states, as composed through the civil and political union of individuals, either as actually existing in this age, or as having existed in past ages, as unfolded, described, and delineated in the authentic historical records transmitted to us by our predecessors, we find that the juridical or legal relations, which we have mentioned as existing among nations, arise chiefly, if not entirely, from the following sources :—

#### *First Source.*

They arise, in the first place, from their co-existence and common nature and organisation as separate and independent states, and from their position or location on the surface of this globe, as occupying exclusively certain portions of that surface, as territories or dominions, con-

tiguous or remote, and divided by seas, mountains, or rivers, whether in their early and apparently original rude state, or in a more cultivated and civilised condition, but without any previous direct act of reciprocal intercourse. The rights and obligations concomitant with, or consequent upon, these primary relations of states, appear to have been denominated by Grotius and his followers, "*Jus gentium naturale, necessarium et primarium*;" and they are unquestionably the basis of all subsequent voluntary or conventional arrangements. They are inherent and involved in the very constitution and organisation of nations, and may, therefore, be called essential. They are general and common to all nations, and they last while the nation lasts; and may therefore be distinguished as permanent or perpetual rights. But we cannot agree with some late writers, such as M. Th. Ortolan, in his "*Règles Internationales de la Mer*," 1844, M. Oppenheim, in his "*System des Volkerrechts*," and Dr Wheaton, in the last edition of his "*Elements*," 1848, in calling them absolute rights; because all rights are, from their very nature, relative or bear relation to other persons, whether individuals or nations, and are limited and regulated powers.

That all the essential, general, common, and permanent juridical or legal relations, and consequent rights and obligations, which may possibly exist or arise between or among nations or states, have been perceived or felt and recognised in the practice of mankind, cannot be demonstrated by exhaustive analysis. And as little is there any reasonable prospect of obtaining any evidence of a simultaneous agreement either among all nations, or even among the European nations and those who have eman-

ated from them, recognising all the essential, common, and permanent juridical relations. But from the absence of any evidence of such a simultaneous agreement or joint consent, it by no means follows that such juridical relations and legal rights and obligations have no existence. And instead of admitting, as the ablest very recent writer on the subject, Professor Heffter, of Berlin (1844,) seems to do in his Introduction, that such an external law of states in relation to each other does not actually exist for all the nations on the surface of this globe, and that it is only in Europe and among the nations who have emanated from it that such a law has come into general consciousness, or conviction and feeling, we would maintain that the essential, common, and permanent juridical relations among states exist and are applicable, in the course of their advancement in civilisation, to all the separate and independent nations of this globe, from Britain to China, from Russia and Sweden to the South of Africa and Australia ; and if not intuitively apprehended and felt by all the ignorant inhabitants of these countries, are understood and felt by all those of ordinary intelligence, however much they may be disregarded in practice. Indeed, Professor Heffter seems afterwards to be of the same opinion with us in the first section of his first book, where he treats of what he terms the fundamental rights of states. And without pretending to give any enumeration of these juridical relations, rights, and obligations, as founded on an exhaustive logical analysis, we may specify the following as the chief of the class of international rights and obligations to which we refer, as having been recognised in the course of past experience, although unhappily not always observed :—

1. Right of existence, and self-preservation as a state, including the right of defence, resistance to aggression, and combat, or the use of physical force, against all nations or tribes which actually threaten danger, and of taking previous measures of security against such danger ; as also the right to maintain the national integrity, and exclusive possession of territory and adjacent territorial sea, when bounded by the sea.

2. Right of national sovereignty and independence ; freedom from foreign control ; equality of nations in point of right ; exclusive self-government, legislative and administrative—national and municipal.

3. Exclusive judicial power and jurisdiction in the administration of criminal or penal law, and of civil private law, with regard to persons, resident natives or foreigners, and with regard to property, immoveable, as lands, or moveable effects or commodities, domestic or foreign, situated within the territory.

4. Right of self-advancement as a people, cultivation and development ; right to promote national welfare and prosperity.

5. Right to the common use of the oceans or large open seas, for the purposes of navigation ; right to procure the produce of the open seas by fisheries.

6. Right to prosecute trade or commerce with such other nations as may be so disposed, subject to such restrictions as the collision with the higher and more important rights of other nations may render necessary.

7. Right to national reputation, name, and reciprocal obligation, to a fair and just estimation of national character.

Some of the ideas and feelings, only indefinitely indi-

cated by these general terms, such as the right of resistance to personal assault, violent seizure of moveable effects, and territorial aggression, are intuitively apprehended and almost instinctively felt by all the population, of whom even rude tribes are composed. Most of them come home to the consciousness and conviction of individuals of ordinary intelligence, of whom the expressive but not easily defined attribute or quality of "common sense" can be predicated; and to the more educated classes of a community all of them are either self-evident truths, or easy and obvious deductions from such truths. At all events, none of them are derived from, rest upon, or require for their foundation and recognition, any joint simultaneous consent, any bi-lateral contracts, or any conventional acts of nations, such as public treaties.

### *Second Source.*

In the second place, general common International Law is not limited to those primary juridical or legal relations among states, which we have just been contemplating. We find from observation and experience, that the powers and acts of men living in separate territories, and in independent civil societies or communities, are not confined to their merely internal concerns. From the mode in which the omnipotent and all-wise Creator has constructed this globe, and from the physical laws which He has established for the regulation of the mental as well as the material world, such as the diversities in climate, soil, and produce, natural and industrial, the different degrees of advancement made by nations in

civilisation, in the cultivation of the earth, in the division of labour among individuals, and in the arts and sciences generally, mankind, as divided into nations, occupying separate territories, if not compelled from necessity or urgent expediency, are induced, by the desire of comfort and convenience, to have intercourse with the inhabitants of other countries than their own, for the purpose of an interchange of locally superabundant or superfluous commodities for locally requisite and useful commodities. And thus states and their subjects come to have acts to perform and lines of conduct to pursue towards each other. These acts of states and of their subjects, as of individuals in civil society, it is plain, may either be separate, independent, and uni-lateral, without any express simultaneous or joint consent or agreement on the part of two or more states; or they may proceed from the intervention of simultaneous joint consent between or among two or more nations. Under this second head we contemplate only those uni-lateral acts which do not involve any such joint consent or express agreement.

The uni-lateral acts of nations which we here contemplate, it is manifest, may be either beneficial or hurtful, and may, as such, create rights and obligations in other states without any mutual consent being interposed in conventions or treaties.

The merely moral or ethical sentiments of nations towards each other, being less requisite in consequence of their mutual independence, and being counteracted, perhaps, to a certain extent, by patriotic feelings, are certainly more feeble than among individuals living in the same society, who are much more dependent on each other. And accordingly, with perhaps a few exceptions,



nations have seldom conferred gratuitously benefits upon each other. For if, in the arrangements of their tariffs of duties on the importation of the commodities of other nations, they occasionally favour particular states, these matters are generally effected by treaties of commerce, and proceed, not from purely benevolent, but from interested motives. At the same time, however, as among individuals, so among nations, uni-lateral acts, if beneficial, may create a right to re-imbursement of unauthorised expenditure, incurred for the behoof of others, and a right to remuneration and recompense for laborious and skilful exertions, though unauthorised, if successfully and usefully bestowed, and exercised for the behoof of others.

On the other hand, the separate and uni-lateral acts of independent nations, as of individuals, if hurtful, may, beside the primary right of defence or resistance to aggression, create or give rise to a right to restoration of the *status quo*: a right to restitution, when practicable; and when restitution is not practicable, a right to reparation or indemnification.

But these separate and uni-lateral acts of independent nations may, at the outset, be comparatively harmless, indifferent, convenient or inconvenient, or optional and matters of choice, and yet may come to have juridical or legal effects. And these effects may regard either the state which is the agent, or the state to which the act relates, or both of the two, or other nations. Thus, if a state has continued to follow a particular line of conduct in relation to other nations for a long period, and allowed them to proceed upon the faith and reliance of its continuing to do so in future, it is not entitled suddenly to alter that mode of conduct, and to disappoint the

reasonable expectations which it had thus excited, but must give due previous intimation of the intended alteration.

Again, among juridical relations, arising from such uni-lateral acts, without the intervention of express consent on either side, or treaty, the primary principles of national independence and equality in point of right, and the principle of reciprocity, have a very important and extensive influence. Thus, when a particular line of conduct is followed by any one nation towards other nations uniformly and for ages, the latter acquire a right to observe the same or similar line of conduct towards that nation in the same or similar circumstances: *Nam quod jus quisque dat aliis, eodem jure utatur*. And upon the principle of reciprocity and equally distributive justice, there arises a right in one state to act towards another state in the same or like manner as that in which the latter state has acted towards the former, provided the rights of third parties be not thereby affected. In other words, there arises an obligation on each state to demand or exact nothing from other states which it is not disposed to allow, or does not *de facto* allow them—an obligation to treat other states in the same or the like manner as that in which it requires them to treat it.

Again, the continued acquiescence of a nation in a particular line or mode of conduct observed towards it by other nations warrants an inference of its consent to such treatment—to do away which a remonstrance or protest is necessary. And when two or more nations, without any joint consent or compact, separately continue for ages to observe the same or a similar line of conduct

towards each other, they are reasonably held to have adopted that line or mode of action, and to have given each other a right to persevere in it until altered, either by a special convention, or by the separate spontaneously concurrent adoption of another line or mode, without any convention or treaty.

Farther, when these uni-lateral acts of states are not positively hurtful, and manifestly *prima facie* unreasonable and unjust, and, being indifferent, or matters of discretion, option, or choice, have been uniformly repeated and continued for a long period, such as during several ages, they become, like the long and uniformly repeated and continued acts of individuals in civil life, and in the internal private law of states—what we call general customs or usages ; and, as in this internal common law, which determines the rights and obligations of individuals, they acquire a juridical validity and legal force. Nor, in recognising this doctrine, do we expose ourselves to the, perhaps at first sight plausible, objection which has been urged against all consuetudinary or customary law. It has indeed been argued, that there is an absurdity in propounding custom or usage, which is the mere repetition of the same or similar actions in succession, as the foundation of law and right. And, no doubt, it does not appear, at first sight, how an act which is not originally right and legal can be rendered such by mere repetition, without the interposition of a legislator, having a just title and rightful authority to prescribe rules of conduct, or without the consent of both and all the parties interested. But we do not here proceed on the supposition of the mere successive repetition of the same or similar acts having of itself, or giving, much juridical

value or legal validity. Along with M. Von Savigny \* and the late acute Professor Puchta,† we view the long, successive, uninterrupted, and uniform repetition of the act, which constitutes the usage or custom, as clearly indicating and affording satisfactory evidence of the existence of the notion and feeling of right or legality in the consciousness and conviction of the great majority of the population, of whom the assemblage of nations is composed. In the uniformity of a long-continued and permanent mode or course of action, we recognise its common root, as opposed to mere accident or chance—the firm belief of the people. And custom is thus the sign or mark by which we recognise positive or established law, not its original foundation.

Thus, in addition to the “*jus gentium primarium et necessarium*” of Grotius, Wolff, and Vattel, there exists, what is properly enough denominated “*jus gentium secundarium*”—a secondary branch of general common consuetudinary international law, arising from and founded on the habitual uni-lateral acts of nations, indicating their consciousness or conviction, and almost instinctive feeling of right, quite unconnected with, and distinct from, particular conventional international law, which, as we shall see in the sequel, rests entirely upon, and necessarily presumes, their joint and combined consent.

We have also, at the same time, pointed out a great many universally recognised international rights and obligations, which do not arise from, but are totally independent of, stipulation or treaty. And although we have

\* Von Savigny, “*System des Heütigen Romischen Rechts*,” §§ 12, 29.

† Puchta, “*Gewohnheitsrecht*,” book iii. chap. 2.

not pretended to exhibit all these rights and obligations by an exhaustive analysis, we have given a tolerably specific enumeration from observation and experience.

*Third Source.*

In the third place, besides the rules of compulsory justice before noticed, which are applicable to independent nations, whether essential and primary, arising from their nature or organisation and position or location as such ; or secondary, from their urgently expedient, if not absolutely necessary, intercourse with each other, as exhibited in their common habits of action, practices, and customs, there also exist or arise, as we have seen, a great multiplicity and latitude of actions and proceedings, not merely possible, but shown by experience to be practicable, which are not manifestly injurious or aggressive, but comparatively harmless or indifferent, or are optional and discretionary, to be directed by the will and consent of these nations. There are thus ample room and occasion for having such proceedings regulated by express consent in conventions, or public treaties. The utility of conventions or contracts in civil life, in the internal common private law of states, is found to extend to the intercourse of independent nations. And various rules come to be fixed between or among these nations, by such express stipulations, proceeding upon the general legal principle *pacta sunt servanda*, and constituting what has therefore been denominated *jus pactitium* or *conventionale*.

Whether the rule *pacta sunt servanda*, which is the foundation of all contracts among individuals in civil life,

and of all international treaties, although long recognised as such, be really a first truth, and not resolvable into another more simple element, is not, perhaps, altogether clear. \*

But, without here aiming at any farther simplification of the basis on which conventional international law reposes, we willingly recognise the principle of *pacta sunt servanda* in its broadest sense, and to its full extent, as co-ordinate with the legal principles, *Neminem lædere, suum cuique tribuere*.

In point of fact, the great number of treaties which have been concluded among civilised nations in the course of the present and two last centuries, and which have not expired, or been legally annulled, or in any way ceased to be obligatory, form a large portion of international law. And in each particular question or disputed case that occurs, although not the original or primary source of international law, such treaties, especially the latest, are to be first consulted, as constituting the special bargain which the nation or its government has deemed it expedient to make in the circumstances; whether confirming a pre-existing rule of the common consuetudinary law, or abandoning a pre-existing right or obligation, or creating in future, for a time, a right or obligation, when the point was previously a matter of indifference, or discretion, or of choice, or option.

We hold, also, that public treaties in general are *bonæ fidei contractus*, and are to be construed, not literally

\* Bentham's Works. Austin, "Province of Jurisprudence determined," p. 365; and Warnkoenig, "Rechts-philosophie," §§ 175, 176, 177, 178. Freiburg, 1839.

and strictly, but liberally, and according to their spirit ; concurring in the following doctrine of the Prussian professor, Hoffner : \*—"Treaties are legally obligatory, and binding in duty to complete honest and fair, or candid fulfilment of whatever has been thereby undertaken to be performed ; and doubtless, not merely of what has been thereby literally promised, but also of what is conformable to the essence of every contract—of what is conformable to the concordant views and intentions of the contracting parties ; that is, the spirit of the treaty."—(*Gemäss dem Geist der Verträge.*)

Further, conventional treaties among nations are particularly useful in ascertaining and in improving the state of international law. In that law, various cases occur in detail, in which a certain indefinite time is involved as a condition or limit, or in which a more precise description of goods or effects, as articles of commerce, is required. And in such cases, treaties, for instance, by fixing the period allowed upon a rupture for the departure of foreigners, or by specially describing what goods are to be deemed contraband of war, perform in some measure the functions of statutes or legislative enactments in the common private law of a state, when the statute fixes the period of prescription, and determines other such matter naturally indefinite.

In international common law, likewise, as in the internal private common law of states, the common customary rules adopted in practice may, in the progress of civilisation, become cumbrous, or productive of hard-

\* "Das Europäische Völkerrecht der Gegenwart," p. 94. Berlin, 1844.

ship to third parties not intended or required, or, in such altered circumstances, no longer adapted for the attainment of the legitimate object which all parties had in view. And in such cases of common consuetudinary international law, conventional treaties among nations to a certain extent and in some manner serve the purpose of legislative enactments in the internal common private law of states, and are useful in affording an opportunity to nations of modifying the customary rules which previously prevailed in practice, and establishing rules in the reciprocal intercourse of the contracting parties. But the analogy, in this respect, between treaties in international common consuetudinary law, and legislative enactments in the internal common private law of states, obviously extends no further. Legislative enactment is manifestly the exercise of the supreme power of the state concentrated in the government, and binding upon all the members of the community, who, though fellow-citizens in relation to each other, are the subjects of the state or government. But there is no such supreme legislative power among or over separate nations, who are confessedly independent of each other, and have no superior on earth.

Further still, when a rule of conduct in their reciprocal intercourse has been adopted by treaty by all civilised nations, (by which is generally understood the European nations, and those who have emanated from them,) that rule may not only become, by this express almost universal consent, a part of positive or established international law among these nations, as long as the treaty endures or is renewed, but may, by long-continued reciprocal observance after the treaty has ceased to be



binding, become a part of general common consuetudinary international law. For such a purpose, however, or to have such an effect, the consent given by treaty or convention must have been universal—so far, at least, as regards the nations to whom the rule is sought to be applied; and at all events must have been given, and the rule continued to be observed, by the nations against whom it is urged, after the lapse of the period of duration of the treaty, or its cessation from other legitimate causes.

For a particular treaty or convention between two, or among several nations, however numerous, acceded to by other nations, can never bind those nations who are not parties to it. Learned and industrious men, like M. de Martens, may collect from the great numbers of treaties which have been concluded among civilised nations the usual subjects of stipulation, and may, by arranging and classifying the rules so stipulated, produce a systematic work, binding and obligatory upon the contracting parties, so far as the treaties out of which it is compiled or composed are still in existence and force; and such a compilation may, no doubt, be otherwise useful historically. But it is vain to maintain that in this way any code of international law can, consistently with sound legal principle, or accurate logical deduction, be reared up or created, such as to be binding upon the nations who were not parties to the treaties, or even upon the contracting parties, after those treaties have expired from lapse of time, or ceased, from other legitimate causes, to be legally obligatory.

We have thus traced the origin of international law to three distinct sources, all existing in fact, and ascertained

by observation and experience ; and as the result, we find two distinct branches, or component parts, or divisions of that law : first, Common consuetudinary law, including its scientific development by jurists and judicial determinations ; secondly, Conventional law, composed of rules established by treaties still in force, and legally obligatory.

Besides these sources and this bi-partite division, we do not see any valid grounds for admitting as branches or component parts of international law, either the "analogy" of M. de Martens and M. Klüber, or the "reason" of M. Ortolan and of M. Th. Ortolan, the latest French writers on this subject.

If by "analogy" be meant reasoning or logical deduction from premises by analogy, it is a faculty of the mind applicable to all the sciences as well as that of international law, and obviously cannot, as such, with any propriety be viewed as a branch of that law, or, indeed, of any particular science. If by analogy it be understood that not merely identical or similar cases, but likewise analogous cases, are to be held sufficient to support an argument or general rule inferred or deduced from them, there will be great risk of these inferences or deductions from analogous cases proving erroneous ; and, although analogical reasoning is certainly admissible, if cautiously conducted, in the science of international law, as well as in all the other sciences, it cannot properly be said to constitute a component part of that law, either co-ordinate or subordinate.

As little can we concur with M. Th. Ortolan, and the eminent French lawyers whom he states he consulted, in placing "reason" as the first branch or source of inter-

national law along and co-ordinate with common consuetudinary law and conventional law. Indeed, he seems to have fallen into the error of preceding writers, pointed out by Mr Bentham ; for there does appear to be an awkwardness or inaccuracy, if not inconsistency, in the arrangement which M. Th. Ortolan merely adopts after several anterior writers, inasmuch as it places "reason" as the *first* source or branch of international law, and at the same time holds that "reason" is only to be consulted in the *last* place, after conventional and after common consuetudinary law. There can be no doubt that in practice the conventional law of nations ought to be first consulted, because a treaty is a special contract by the state or government, very frequently conferring a right or imposing an obligation which did not previously exist, and usually a deviation, by the express consent of contracting parties, from the pre-established practice. And the error seems to consist in introducing "reason" as the first constitutive authority in positive or established international law. The truth, indeed, seems to be, that reason may be exercised as a faculty, or appealed to as an authority, both in interpreting the import of treaties—that is, the conventional law—and in discerning and ascertaining the common consuetudinary law of nations, as founded on their juridical relations, and on their long-established and uniform practice, but cannot be correctly introduced either as a branch or as a source of international law, any more than of any other science. In modern languages, reason appears to have chiefly two meanings—either what is reasonable, what reason enjoins or dictates, (*ratio juris, rationis dictamina*,) or the faculty by which the mind intuitively perceives or appre-

hends first truths ; or *l'Art de Raisonner*, so beautifully illustrated by the Abbé de Condillac, in his *Cours d'Etude*, in its application to physical astronomy—viz. the faculty of logically deducing the consequences which flow from first truths, intuitively perceived or apprehended, or otherwise pre-established. But if the term reason be used to denote a faculty of the mind, it obviously, in that sense, cannot be employed, either logically or grammatically, to convey the idea of a branch or department of law for the compulsory regulation of human conduct. And if it be used to denote what is reasonable—what reason dictates among nations—reason is, no doubt, in that sense, sufficiently comprehensive to embrace law ; but it is manifestly too comprehensive and indefinite to include merely and solely, and to define or describe distinctly, law susceptible of coercion, much less to form a subordinate member in an arrangement of the branches or constitutive parts of a particular department of such law.

Having now traced the sources and distinguished the two great branches or component parts of international law, we shall proceed to mark the nature, limits, and effects of these two branches—common consuetudinary and conventional.



## **CHAPTER III.**

**FARTHER ILLUSTRATION OF PUBLIC INTERNATIONAL LAW,  
ITS BASIS AND CONSTITUENT PARTS.**



### CHAPTER III.

#### FARTHER ILLUSTRATION OF PUBLIC INTERNATIONAL LAW, ITS BASIS AND CONSTITUENT PARTS.

IN our last chapter, we endeavoured to point out the boundaries of the subject of our inquiries as being properly and strictly international law, not the ethics or morality of nations, but compulsory or coercive law, unfolding rights and obligations susceptible of physical enforcement ; and we also endeavoured to trace the different sources of that law—meaning by that term the scientific sources of the rights and obligations of which international law is composed as existing in nature, or arising in the natural or ordinary course of events taking place on this earth ; not the mere record of those international rights and obligations. In investigating these sources, we found ourselves constrained and authorised to recognise and admit three of them :—First, the co-existence and co-existent position and mode of communication among nations as established by physical material causes or laws in the construction of the surface of this globe, and the physical mental causes or laws established in the constitution and organisation of mankind as united in civil society, forming communities or states, and exercising an influence upon each other according to their respective degrees of advancement in civilisation. Secondly, the acts of nations in relation to other nations,



and affecting other nations, but separate and uni-lateral, without any joint agreement, compact, or convention ; without any union of two or more wills. Thirdly, the joint acts of nations, agreements, compacts, or conventions ; the union of two or more wills, fixing the rights and obligations of nations towards each other for the present, and in future, so long as such agreements and conventions endure, and so far as they extend.

But although, from observation and experience, we were led and authorised to recognise three sources of international law, it does not follow that we are required to admit or recognise three different kinds of that law, or to make of it a threefold or tri-partite division. For, upon more minute examination, it will be found that each of these sources does not produce a separate set of rules or collection of rights and obligations of such an identical or similar nature, possessing such a collection of similar qualities in common, as to constitute each a separate and distinct body of law. On examination, it will be found that the first and second sources concur in producing only one set of rules, or collection of rights and obligations, as that just alluded to, and the third source another. The class or kind of law, or compulsory legal rights and obligations, arising from the first and second sources, are distinguished by the qualities of being general and common, most of them essential and permanent ; arising, not from any union of the wills of mankind, joint consent, or agreement, but from certain physical relations, material and mental, among nations, existing, or arising, or coming to take place, as events, facts, or uni-lateral acts ; proved chiefly by long established customs and usages, consisting

not merely of senseless repetitions of the same useless or indifferent acts, but of repetitions for such a length of time, and so uniform as to indicate, as their cause, a conviction in the people that such are the rules of right and obligation, and therefore of compulsory or coercive law. The other class or description of legal rights and obligations among nations, arising from the third source, is distinguished by the qualities of being particular or special, arising from the union of the wills or joint consent of two or more nations, from agreement, compact, convention, or treaty. There thus, we find, exist, not three, but only two descriptions, constituent parts, or branches of international law, of which the boundaries, like the colours in the rainbow, may run into each other, but are sufficiently distinguishable : namely, general common law, mostly essential, or permanent, arising from the physical, material, and mental relations of nations as located on the surface of this earth, and affecting each other by their uni-lateral acts without any previous agreement ; and particular international law, arising from the union of the wills of nations, as expressed in compacts, conventions, or treaties, and generally or usually called conventional, or *jus pactitium*. And these two component parts or branches of international law we shall now consider separately.



## **CHAPTER IV.**

**FIRST COMPONENT PART OR BRANCH OF PUBLIC INTERNATIONAL LAW, USUALLY CALLED COMMON AND CONSUECUDINARY.**



## CHAPTER IV.

FIRST COMPONENT PART OR BRANCH OF PUBLIC INTERNATIONAL LAW, USUALLY CALLED COMMON AND CONSUETUDINARY.

### SECTION I.

#### *The Foundation.*

IN further considering the basis of the common consuetudinary law of nations, its distinctive character, and the evidence by which it is supported, we shall begin with briefly recapitulating what we formerly observed on this subject, in tracing the scientific sources of international law generally, so far as regards this branch ; and we shall then answer, and we trust refute, the objections which have been stated of late years by some Continental lawyers, to the validity and binding nature of common consuetudinary international law, including a reference to its records.

As in the internal private law of nations, the legal obligations of individuals to each other are not limited to those arising from agreements, or contracts, although numerous and of great importance, so in international law, all the legal obligations of nations, in relation to each other, do not arise from treaties. On the contrary,

as in the internal private law of a people, prior to and after legislative enactments, there are perceived or apprehended, and felt, certain juridical or legal relations among individual men, from their constitution or organisation and position on the surface of this globe ; from their birth and death, the mode in which the species is propagated and perpetuated, and the consequent connection of family and kindred ; from their congregating and living together in civil society, and from their individual intercourse, as members of that community, for the various purposes of life : so in international law, both before, and after, and independent of the existence of treaties involving the mutual consent of separate and independent states, there exist certain juridical or legal relations among these nations, viewed, as of themselves each constituting a whole, as assemblages of men united under one government, and forming independent states, arising from their co-existence, their constitution, and organisation as such ; from their relative position and circumstances, as consisting of different races, as occupying different territories, divided by seas or ranges of mountains ; and particularly from their intercourse by land or sea, in commerce or otherwise, for the purposes of obtaining the necessities and enjoying the comforts and superfluities or luxuries of life.

Those primary and essential juridical relations, rights, and obligations which thus arise, under the physical laws established by the Omnipotent and All-wise Creator, from the common constitution, corporeal and mental, of mankind congregated into communities and states, and from the circumstances in which they are located, are obviously not the creatures of contract or convention.

Most of them are intuitively perceived, instinctively felt, and acted upon, by all individuals of ordinary intelligence; they exist, as M. de Savigny observes, in the common consciousness and conviction of the people; and they are called consuetudinary, as well as common, because they exhibit themselves in the permanent usages and uniform habits and practices of nations, indicating, by their continued repetition and uniformity, the consciousness and conviction of their legality. They are what the Prussian Professor, Heffter, terms "the fundamental relations of states as such—the essential rights and obligations of nations."\* They are manifestly anterior to human laws and conventions, and are the bases of all the rights and obligations arising from the acts, whether uni-lateral or bi-lateral, of mankind, united in civil societies. Though frequently violated by ambitious governments and aggressive nations, these are recognised in their very violation by the attempts usually made in declarations of war, and other such proclamations and manifestoes, to justify the unlawful proceedings.

But besides those primary juridical relations, those common fundamental and essential rights of nations, which arise from the physical laws established by the Omnipotent and All-wise Creator in the corporeal and mental constitution of mankind, and in their location on this earth, as different races, and separate tribes and communities or states, not from futile human conventions, or pretended astute diplomacy, there are also comprehended under common consuetudinary international law other juridical relations, rights, and obligations, which do

\* "Das Europäische Völkerrecht der Gegenwart," 1844.



not arise until they are called forth into existence, and come into operation through the delegated power of action bestowed by their Creator on mankind—on states as well as on individuals.

For, as in the internal private civil law of states, juridical or legal relations among individuals arise, not merely from agreements or contracts between or among them, but also from the uni-lateral acts of individuals—either illegal, as producing the obligations of restitution or reparation, or legal, creating a right in others such as that to recompense or reimbursement—so, in international law, a nation or state may not only by its illegal act, or series of illegal acts, such as unprovoked invasion and plunder, subject itself to the legal obligation of restoring matters to the *status quo*, and of repairing damage and defraying the expenses of the war occasioned by the invasion to the party aggrieved, but may also, by its act or series of acts—that is, conduct towards other nations in matters which are comparatively indifferent, or which do not involve any violation or infringement of the rights of others—create a right in other nations to act in the same manner towards that nation, and to treat it in the same manner as it treated them, upon the juridical or legal principle of retributive justice or reciprocity.

But here it is necessary to investigate more narrowly the nature, operation, and effects of the uni-lateral acts of nations, as establishing international law. So far it is obvious that these separate and uni-lateral acts performed by a nation, however valid and effectual, and binding upon all the members, citizens, or subjects of the state, cannot, like the bi-lateral contracts between nations, or treaties before alluded to, bind, or impose any legal obli-

gation on, other separate and independent nations, or render any rules thereby sanctioned a part of international law, obligatory on other independent states. It has been said that, by his celebrated Ordonnance de la Marine of 1681, Louis XIV. intended to dictate to other nations, and to impose a code of maritime international law on Europe. But his able ministers and the framers of that ordonnance, whoever they were, had too much sense not to be aware that it had and could have no legal validity beyond the subjects of France, or the inhabitants of the other territories which Louis had subjected or might subject to his sway ; and could have no influence over other nations, beyond the reasonableness and equity of many of its regulations—the Ratio Legis.

Although, however, the uni-lateral acts of, or the particular regulations established by, the supreme power of any one state cannot directly bind or impose any legal obligations upon other independent states, they may have a legal effect in various other respects. And now we again find it necessary to make some distinctions, according to the nature of these acts. In the internal jurisprudence of states we found that without any contract, or previous authority, commission, or mandate, *beneficent* actions might create the legal obligations of reimbursement of expenses beneficially incurred, or of remuneration for services which had proved useful or profitable ; but that while such *beneficent* uni-lateral actions seldom occurred in the intercourse of nations, uni-lateral acts, obviously hurtful and aggressive, gave rise to the rights of resistance, of restoration to the *status quo*, of restitution of moveable property violently or fraudulently abstracted, and, where restitution is impracticable, of reparation for

damage inflicted. But besides such beneficial and hurtful or injurious acts, there are various others, which are not properly or precisely of either description, but which originate rights and obligations. In this view, without attempting any exhaustive analysis, we may consider states either in their active or their passive and acquiescent capacity, or as each following the same or similar courses of action, but without any previous concert or compact. Thus a state which acts in a certain way for a long period, or for ages, is not entitled suddenly, or without due previous notice, to change that mode of conduct upon which other nations have relied, so as to occasion damage to them. And this rests upon the same mere general principle upon which the legal obligation to fulfil contracts is founded, viz., the obligation not to disappoint the reasonable expectations which we have excited, and thereby occasion damage or loss. Again, a state which acts in a particular manner towards other states for a long period, as for ages, gives them, upon the legal principle of reciprocity, a right to act towards it in the same or a similar manner. On the other hand, a state which for a long period acquiesces in the conduct of other states towards it, not positively hurtful, gives them a right to infer or presume its consent, and to continue the same mode of conduct, until it protests against such conduct. Again, when all the states under contemplation adopt, without any previous agreement, the same rule in relation to each other, and persevere in it for ages, they give each other a right to rely upon the continued observance of that rule in time coming; and although, perhaps, each state may change that rule, so far as regards itself, at least, by relaxing it in favour of

other states, it does not follow that other states are legally bound also to change the rule which has been observed for ages, or, if the rule be founded in juridical relation and legal principle, can be legally compelled to deviate from it.

Again, when in the course of events, and in the varied intercourse of nations in their reciprocal acts, the rights of different states come in competition, and there is a collision, it seems plain, that, if one must so far yield, the primary and essential right, which is of the greatest importance, is entitled to be supported, and that the inferior or subordinate right, which is of less urgent importance, and which admits of compensation for the non-exercise or limited exercise of it, must yield ; not the *former*, the more important right, which does not admit of such compensation in any shape ; provided always its exercise be regulated by all reasonable and salutary practicable restrictions.

In these different cases, although there be no convention, there is obviously at least a legal principle for their decision. But, in various other uni-lateral acts, which may be performed by nations, such a principle is not so apparent or discernible ; the determination appearing to turn very much on the long-continued and uniform repetition of the act, the habit or custom, or usage. And here, certainly, the doctrine of M. de Martens, in his *Droit de Gens Moderne de l'Europe*, § 67, is not very satisfactory :—"Simple usage," he says, "comprehends only an imperfect obligation ; it cannot, therefore, be extorted or exacted by force : each nation preserves the right of departing from it, or abolishing it, provided it gives notice in time of such departure or abolition.

This considerable part of our position, or established law of nations, which is founded upon usages, appears, then, to rest upon a feeble basis, and to be subject to perpetual vicissitudes. The less intrinsic force, however, that usage has, the more it unites with it external arguments, to insure its duration to a certain point." These arguments M. de Martens states to be : " 1. The natural force of habit, which, in acts of minor importance, and frequently repeated, exercises its power over nations as over individuals. 2. The peculiar advantage which results from the continuance of certain usages. 3. The desire of appearing in the eyes of foreigners a civilised, enlightened, and well-intentioned nation : on the other side, the fear of a *retorsio juris* on the same point : the fear of seeing ourselves refused other points of usage, in compensation of those which we have refused ; the fear that other nations might make common cause against us, in the refusal of usages which it is important to us to see observed ; and, finally, the fear that the violation of usages practised among friendly nations might be interpreted by others as the precursor of actual injuries with which they were threatened on our part, and, in this point of view, be considered as a reason justifying the anticipation of the hostilities to which they believed themselves exposed."

Now these considerations are certainly strong in a national and prudential point of view. They seem to impose more than what M. de Martens, like many other modern jurists, calls absurdly an imperfect obligation— in other words, a merely moral or ethical obligation, which does not admit of enforcement. Nay, it is through the self-interested views and fears of individuals that the

internal criminal law of states chiefly operates in the prevention of offences.

But beside these considerations going far to impose a legal coercive obligation, much stronger than what some recent jurists have ascribed to mere *comitas gentium*, or *convenance reciproque*, and beside the legal effect of usage, which we have just considered as affording evidence of consent, to the limited extent of precluding a sudden alteration of the usage to the injury of other nations, there remains the true and solid basis of all common consuetudinary law, whether internal or external and international, so far as dependent on human action, as ingeniously and profoundly illustrated by some recent German lawyers of the first order, such as M. de Savigny and Professor Puchta. For here, again, the principles in which the internal common consuetudinary private law, or civil jurisprudence of states, is founded, it is proved from observation and experience, extend also and are likewise applicable to the external law of nations.

In the internal jurisprudence of states, as formerly observed, the legal validity and authority of common consuetudinary law do not solely depend or rest on the mere repetition of the same or a similar act, without regard to its nature or effects, or the views and feelings of the agent performing it. The custom or usage is not the foundation of the rule of the common law, or the basis on which it is reared. It is the sign, or mark, or indication of the rule having been recognised as legal in the conviction of the people. It is the evidence of such a rule or course of conduct having been settled as legal by successive generations, just as the statute book is the evidence of certain rules having been recognised simul-

taneously or successively by the people in their legislative capacity—that is, by their representatives, as constituting a legislative body according to the form of their government.

All acts of any description are not qualified, or of such a nature, as to become the indications of common consuetudinary law, however often they may be repeated, or however long continued. The act must be that of a rational being of ordinary intelligence, not absurd, or indicative of an insane or fatuous mind. It must not be a purely benevolent and beneficent act, or one of charity, or performed as becoming merely in a moral point of view, however laudable otherwise; for acts of purely benevolent generosity or charity, however often repeated, can never impose upon the agent a legal obligation, through which he may be compelled to perform such optional and discretionary acts. As little can the act be of a hurtful, aggressive, or criminal nature; for frequent repetition can never justify or palliate a crime, or create any legal obligation, except, as we have seen, the legal obligations of restitution and reparation. In truth, to found a rule of common consuetudinary law, it must have as its basis the consciousness and conviction of the people of the legality of the rule. But how is this to be ascertained? The following seems to be the answer and solution of the problem.\*

The act must not be separate or individual; it must, like the common sense of mankind, be general and common to all the members of the civil society or community, or of the assemblage of nations or states, whom

\* See Von Savigny, "System," Vol. I. § 28 : 1846. Prof. Puchta, "Das Gewohnheitsrecht," Book III. chap. ii. : 1837.

we contemplate as actually existing. Again, the act must not be single : there must be a plurality of actions repeated in succession ; and the more open, public, and notorious, the better. Again, the course of acts, if they be not precisely identical or similar, must be uniform, without interruptions by intermediate acts of an opposite or different nature. Again, the acts must have been repeated for a considerable time, generally exceeding the ordinary or average duration of human life ; varying with circumstances, but such as to guard against accidental, transient, and variable acts being erroneously assumed as indications of a common conviction of law. Further, judicial decisions have been generally admitted as sufficient indications of the existence of the rules of common consuetudinary law ; and they partake also of the authority of the statutes or legislative enactments of the government, as the representative of the people, in so far as the judicial power in the state supplies the defect of the legislative power, inasmuch as the latter is not able to foresee and provide for all the cases that emerge in the progress of civilisation.

When the qualities or requisites here enumerated concur in the usage or custom, the fair inference and legitimate logical deduction from it is, that it implies, and is the result of, a rule of common law, which corresponds to it, and lies at the bottom of it as its basis. The authority and legal validity are not derived from, and do not belong to, the custom or usage, of and for itself, but are derived from and belong to the rule of law which is contained or implied in it, the *ratio juris*, the *opinio necessitatis*, which are discerned from the custom or usage, just as the statute law or legislative enactment is



discerned and learned from the written or printed statute book.

Such being the true foundation of common consuetudinary law, in the private law or internal jurisprudence of states, so far as derived from or proceeding upon the uni-lateral acts, usages, and customs of the individuals of whom the nation is composed, we find, from observation and experience, that the same mode of reasoning is applicable, that the same juridical conclusions may be logically deduced from the uni-lateral acts, usages, and customs of nations, contemplated as wholes, as assemblages of individuals, in their intercourse with each other. Combining the strictly legal principles before noticed, and the influence of habit, and the considerations of prudence, danger of deviation, and urgent expediency, as before quoted from Von Martens, with the brief exposition just given of the true foundation of common consuetudinary law in general, so far as resulting from the uni-lateral acts of mankind, either as individuals or independent states, we may form a tolerably accurate notion of the grounds on which the authority, legal validity, and obligatory force of common consuetudinary international law rests. And applying these principles, the following seems to be the result.

If the government of a state prescribes to its subjects regulations for their conduct towards the subjects of other states ; or if, without any such directory regulations, a nation acts or proceeds in a certain manner towards other nations, and particularly if this mode of conduct is openly and uniformly continued and persevered in for ages, so as thereby to indicate and prove a consciousness or settled conviction and inward feeling of right in the individuals

composing the nation and its government, that the mode of proceeding which has been followed is just and equal ; other nations then become entitled, provided they have followed the same or a similar mode of action, not merely upon the legal principle of reciprocity as before noticed, to treat that nation in the same or a similar manner as it has treated them, but also, and further, to assume the said mode of action which has been openly and uniformly followed for ages by all the parties in common, without any previous joint arrangement to that effect, as a rule of common consuetudinary appropriately practical, international law, of which the legality has been recognised in their own conduct by all the parties interested in or affected by it, and which is to be relied on, at least till a new rule be adopted by the universal consent of all the parties interested, or till altered by a special bargain between the contracting parties, or a treaty. In this way, indeed, there is no meeting or assemblage at one time, no congress of nations or their representatives, agreeing simultaneously upon certain rules to be observed in future by all and each of them. But although they may not all assemble, even by their representatives in congress, and unite in one common contract or treaty, nations we have seen do *de facto*, from the similar corporeal and mental constitutions, views, and feelings of the individual men of whom they are composed, and from the similar circumstances in which they are placed, both in a rude state and in the progress of civilisation, act very much in the same or a similar manner ; and thus in time come to adopt the same or similar, and so far, consequently, common rules of action towards each other, without any previous concert, or fixing these rules by any

written contract entered into in common, just as in the interior of each independent state, the common consuetudinary or practical law grows up, without and to a much greater extent than legislative enactment or statute law. Further, as we have seen, the juridical or legal relations of independent states, and concomitant or consequent rights and obligations, besides those which arise from their natural constitution or organisation as such, and their respective positions as occupying separate territories, are extended and enlarged by their own separate and uni-lateral acts towards each other, without any mutual concert or joint arrangement. Nor is this principle of legal or compulsory justice confined to any particular department: it holds in war as well as in peace; it embraces all the points in which nations come in contact or collision with each other in their reciprocal intercourse, beyond what arises from their very constitution as independent states, and their relative position on the surface of this globe; and it rests on the same foundation as the rights of national independence and exclusive sovereignty and dominion.

## SECTION II.

### *The Records.*

The separate uni-lateral acts, or series of acts of nations, which thus recognise and give rise to reciprocal rights and obligations in nations towards each other, must, of course, be the acts or conduct of the supreme power of the state or government. But where, it may be asked,

do they exist? Where is the evidence of them? Now, certainly while the records of the second kind or description of international law, namely, the particular conventional law of nations, are contained in the conventions or treaties which modern nations have entered into with each other, and which exist to a large extent in the various ponderous collections of treaties, from those by Leibnitz to those by Martens, the records of the first kind or description of international law, namely, the general common consuetudinary law of nations, are not so easily discovered. General history gives little information on the subject. The evidence is to be sought in a greater variety of documents; but still it exists, and to a large extent.

The first class of historical records in which this evidence is to be found, is that of the written or printed statutes or ordinances enacted or established from time to time by the supreme power of the state, legislative, executive, or administrative; whether they be called acts or statutes, ordinances, edicts, *réglements*, orders in council, or by any similar appellation, so far as they relate to or affect the rights or interests of other separate and independent nations or states, their governments or subjects. Next to these primary and direct acts of the state or government, come the determinations in individual cases, of the judicial establishments generally, of the courts of law of a country appointed by and acting under the authority of the state, particularly of the international courts of maritime prize law during war. And the records or reports of the decisions of these different courts afford the next description of evidence of the conduct of nations, "in matters of general intercourse or collision of rights, towards each other."

Further, the writings of the lawyers of a nation, and particularly of international jurists, afford a third, though perhaps inferior kind of evidence of such acts of nations as we are considering—namely, those which are productive of rights in other nations.

Of these three kinds of documentary historical evidence, the two first are plainly of the greatest weight, the judicial determinations, as well as the enactments or ordinances, of the legislative and executive powers, being acts of the supreme power of the state. So far as they record these acts, the writings of jurists are, of course, of equal authority. But otherwise, or beyond that limit, they merely transmit their own intuitive convictions or logical deductions from such premises in point of legal principle, or merely record the prevailing opinions and sentiments in such matters entertained and recognised by their nation, or the intelligent part of it, or by nations generally. And if the views of such writers are to be received in general with suspicion of partiality from the natural influence of patriotic zeal, their testimony may at least be received without distrust, where it is against the interests of their own country, or where it merely records the practice of their own country.

Compared with the more carefully preserved, and, to a certain extent, better arranged and more accessible documentary evidence of conventional international law as contained in the ponderous collections of public treaties, the evidence of common consuetudinary international law as afforded by the different kinds of historical documents just enumerated, has one considerable advantage or superiority. The latter record what the government or nation has actually done; the former merely afford evidence of

the engagement which the contracting parties have undertaken, not of the actual fulfilment of these engagements, which governments have not unfrequently evaded.

In the last or French edition of his systematic work, entitled *Elements of International Law*, 1848, the North American jurist, Dr Wheaton, we observe, denominates the historical documents we have just been considering the "sources" of international law, instead of the "records;" as if we were to call the volumes of the statutes and of the reports of the decisions of the Courts of Common Law and Equity, the "sources" of the law of England. We prefer the term "records," as more applicable and appropriate, reserving the appellation of "sources" for the scientific sources of the law—those physical relations in the material and mental world exhibited on the surface of this earth, as giving rise to, or involving the juridical relations of rights and obligations susceptible of enforcement. But, of course, whether the one appellation be adopted, or the other, is of little consequence, provided the import be precisely explained and distinctly understood.

### SECTION III.

#### *Objections to Common Consuetudinary Law, and Answers.*

Having thus resumed the view with which we set out, when investigating the sources of international law generally, and illustrated more fully the foundation and nature of the branch of that law which we are here con-

sidering, as now usually called common and consuetudinary, or non-conventional, we proceed, as formerly proposed, to answer the chief objections which have recently been urged to the validity of general common consuetudinary international law, as not resting on a general compact among nations, or universal joint consent—as being obscure, from its very antiquity—as being liable to change, and vague—and as not entitled to the appellation of common law.

That the arguments urged and attempts made, to invalidate the force of common consuetudinary international law, may be correctly and fairly represented, we shall quote some passages from the *Règles Internationales et Diplomatiques de la Mer*, 1845, by M. Théodore Ortolan, the latest French writer on the subject, as to all appearance containing the opinions of the eminent French lawyers, whom M. Ortolan states he consulted in the composition of his work ; and particularly of M. Dupin, who on two occasions in 1845 highly eulogised it in *Reports to the Académie des Sciences Morales et Politiques*, forming the second branch of the National Institute of France.\* As M. Th. Ortolan is not a practising lawyer or jurist by profession, but a gallant naval officer (Lieutenant de Vaisseau, Chevalier de la Legion d'Honneur,) it is surprising that his treatise should exhibit so much information, not only in his own practical department of the profession, but likewise so extensive an acquaintance with the rules of maritime international law during war, especially as professed by France when he wrote. And certainly a general

\* "Revue de Legislation," 1845, vol. i. p. 129 ; vol. iii. p. 522.

acquaintance with the leading, just, and impartial principles of that science, as recognised by the European nations, is highly desirable in naval commanders, often intrusted with the performance of important services, where material collisions of interests may frequently occur, and where sound discretion is so necessary. The work of M. Ortolan, too, is, with some exceptions, well arranged, and, for such a subject, written in a simple, neat, and even elegant style; and he marshals the arguments he brings forward in favour of the cause he supports with such art, skill, and adroitness, as to approach to the astuteness which is usually only acquired from experience, and in advanced age.

After apparently concurring in the division, now generally adopted, of positive or established international law into two distinct parts, viz., common consuetudinary and conventional, M. Ortolan thus proceeds to state the objections to the common consuetudinary law of nations, as before expounded by us. "But the principal •difficulty consists in determining when and how the rules of common consuetudinary international law here alluded to have been confirmed by all the nations in their mutual relations, in such a manner as that they may be collected and united in a sort of code, *unwritten*, obligatory on all; to what extent they may have been recognised and adopted in practice; and whether that adoption has always been, and still is, sufficiently general, that it may be said that each of them, considered separately, makes part of the whole of the common international law, positive and consuetudinary."\*

\* "Règles Internationales de la Mer," vol. ii. p. 438.



Now the objection here stated to the general common consuetudinary law of nations, in the modern sense of the *jus gentium*, on account of the difficulty of ascertaining it, (which is not quite consistent with M. Ortolan's own previously propounded doctrine of reason and custom forming two of the three sources of International Law,) obviously also proceeds on the groundless and gratuitous assumption that *human consent*, or agreement, is necessary to create human legal obligation, such as to justify or authorise coercion or compulsion by physical force. And while it thus goes to set aside and annihilate what we have just expounded as common consuetudinary international law, arising from the two sources before pointed out—viz., what constitutes the *jus gentium naturale, necessarium, et primum*; and the *jus gentium secundarium*, recognised by Grotius, Rachel, Leibnitz, Wolff, and Vattel—it obviously omits, overlooks, and *keeps out of view*, as we have seen, various important facts and events in the human constitution, corporeal and mental, in the local position on this planet of mankind when united into communities or states, and in the progress of mankind in civilisation, both in their internal, political, criminal, and civil institutions and arrangements, and also in their external mutual intercourse or communication, without the intervention of any joint consent or agreement; which facts and events are ascertained by observation and experience, and attested by the authentic records of history.

The difficulty, it is first said, consists in determining “*when and how* the rules alluded to (viz., the rules of general or common consuetudinary international law) have been confirmed by all nations, in their mutual rela-

tions, in such a manner that they can be collected and united into a sort of code, unwritten, but obligatory on all. And if there be here meant the *time* and *mode* of a simultaneous compact among all nations, fixing the rules of their reciprocal conduct, in all their mutual relations, we admit the difficulty is great. Nay, more, we at once admit, that of such a confirmative compact no evidence has yet been produced, or is likely to be discovered ; and that, if alleged, it is a mere fiction, like the original state of nature and the social contract, imagined by Hobbes and Rousseau.

But happily general common consuetudinary international law does not rest upon any such fictitious confirmation by all nations. It rests, as we have already explained, upon higher authority than even the consent of nations given in public treaties. Indeed, consent in treaties is a very unstable basis for justice, legal right, or obligation. *Volenti non fit injuria* is a very questionable maxim even in particular, established, internal systems of law ; and consent, in treaties of peace especially, is frequently a compulsory assent—a submission to what is unequal and unjust, in consequence of one of the parties having been unsuccessful in the preceding war.

In discovering, ascertaining, and methodically arranging all the rules of compulsory justice—all the rights and obligations which compose this general common consuetudinary law of nations—there is, no doubt, considerable difficulty. But this difficulty is by no means insurmountable, or nearly so great as the difficulties which have been encountered and surmounted in the mathematical, mechanical, astronomical, and chemical sciences. Indeed, a great many of the rules of right, as already

observed, are simple and obvious, almost intuitively perceived and apprehended, and almost instinctively felt by mankind. No collections of treaties or commentaries of diplomatists are requisite to teach a nation the right of self-defence and resistance to aggression in almost any shape. And in the progressive advancement of mankind, in the accumulation of information, in the course of experience, transmitted from age to age, and the acquisition of greater skill from habit, this branch of human knowledge, like the other sciences, becomes more complete.

While, therefore, any expectation of discovering evidence of the existence of any simultaneous compact among nations, either original or confirmatory, determining the rules of international law, is futile and absurd, it follows that the absence of any such simultaneous compact constitutes no better objection to the existence and validity of common consuetudinary international law than the absence of the imaginary social contract of Rousseau does to the existence and validity of the internal common law of states, or private civil jurisprudence, originating and unfolding itself progressively in the manner so ably explained by Savigny. And in the preceding observations we trust we have shown that the rights and obligations which constitute the common consuetudinary law of nations are derived from sources equally high, anterior to, and independent of, any formal international stipulation or agreement.

But in the latter part of the critical objection before recited, there is further urged the great "difficulty of determining to what extent they (the rules of common consuetudinary international law) have been recognised

and adopted in practice, and whether that adoption has always been, and still is, sufficiently general, that it may be said that each of them, considered separately, makes part of the whole of the common international law, positive and consuetudinary."

Now, with regard to the propriety and correctness of the application to consuetudinary international law of the term "common," we defer our answer till we come to the passage where the objection is more fully brought forward. And with regard to the extent of the adoption, here represented as so difficult to discover, this is very manifestly a matter of fact, and must, of course, be ascertained by the best evidence to be had. And certainly, the recognition and adoption of this common consuetudinary law, so far as not arising from and founded on previously existing juridical relations, in nature, fact, or actual event, are not to be presumed against any nation on slight grounds or defective evidence. From the generally scanty and defective historical records transmitted to us down to the last two or three centuries, it may often be difficult to arrive, in this investigation, at absolute certainty. But here again the difficulties are much exaggerated, and are by no means insurmountable. Greater difficulties have been overcome in the other sciences, dependent on the physical laws of nature, on facts, or events. The records of the common consuetudinary law of nations are, at least, equal to the records of the *jus pactitium*, or conventional law of nations; indeed, in one respect, as formerly noticed, superior, inasmuch as the latter only show what nations have promised or agreed to do in future, whereas the former prove what they have actually done or established in their own institutions.

Their own internal establishments, their own internal laws and customs, manifestly afford valid, and, indeed, incontestible evidence against nations, with reference to their own conduct and practice. And the evidence so afforded we found to be of the following kinds and degrees :—1. The legislative enactments of the sovereign power, and the regulations, or orders, of the executive or administrative government. 2. The decisions of the judicial tribunals of a nation, as recorded in the reports of these decisions. 3. The writings of the jurists or lawyers of a nation, so far as they record the legislative, administrative, and judicial regulations, and the judicial determinations of the courts of their own country, and also so far as they record the practice of their own and other nations, during their own age. Of course it is only so far as the national conduct or practice, proved in these different ways, affects foreign states or their subjects, that it is relevant in the discussions of international law ; and it is only in this view that the records referred to are competent evidence. But, doubtless, the English admiralty and prize statutes, orders by the king in council, admiralty and maritime prize regulations, the reports of the decisions of the maritime and other courts, and the writings of distinguished lawyers, such as Sir Leoline Jenkins, Molloy, Abbott, and Lord Tenterden, afford competent evidence of the conduct and practice of England, just as the French royal ordonnances, édits, and réglemens, the imperial decrees, the décisions du conseil des prises, and the writings of French eminent lawyers, such as Valin, Emérigon, Pothier, Bouchaud, Guischard, and Dufriche-Foulaines, afford competent evidence of the conduct or practice of France ; and *no nation or govern-*

*ment*, it is manifest, is entitled to complain of being judged by such evidence.

M. Ortolan further thus proceeds in stating the objections urged against the validity of common consuetudinary international law :—\*

“ Since the conformation and maintenance of these consuetudinary rules depend on the progress of each epoch, they are susceptible of undergoing modifications in proportion to the extension of civilisation, and in proportion to the transformation which the succession of times brings about in the views, in the wants, and in the relations of nations. It is possible that some of them may have been practised uniformly at a very distant epoch. Not only is that possible : it is true. It is ascertained by the ancient documents which have reached us, as far at least as such certainty can exist, regard being had to the obscurity of a past imperfectly known. But if, in the interval which has elapsed since the starting-point to our days, the greater part of nations have been seen to depart often from these rules, especially if they have been seen to proclaim and adopt with a common accord other rules quite opposite, it can no longer be said of the ancient usages that they make a part of the common consuetudinary law of nations. \* \* \* \* To set up such a pretension is to give to superannuated customs, which have ceased to be in consistency with the knowledge or enlightened views of the present age, an imperishable effect ; it is to wish to arrest and be the enemy of all progress.”

Now certainly we are well aware, and did not require to be told, that positive or established international law

\* “ *Règles Internationales de la Mer*,” vol. ii. p. 438.

is liable to change, like all other human institutions and affairs, and is not stationary, but susceptible of advancement, like the internal law of nations, both private and public, or constitutional. And we have no wish or intention whatever to throw any obstacle in the way of the progressive amendment of common consuetudinary international law, provided the change be really an improvement for all, provided it operates equally and fairly for and against all nations, provided it be just, reciprocal, and consistent with the independence and equality of nations, in point of right ; not partial, in favour of some, and detrimental to others.

But as the preceding argument is plausible, artfully conceived, and calculated to mislead general readers not well acquainted with the facts and events of modern history in this department, it becomes necessary to examine it carefully. As M. Ortolan, however, selects, as an instance for the illustration of his argument against consuetudinary international law, the question whether the original rule of that law, by which the belligerent was held entitled to capture the property of the enemy on the open seas, although carried in a neutral vessel, and the rule recently attempted to be established, by which the neutral flag is held to protect the goods of an enemy from capture ; and as this question not only involves a discussion of historical fact, as well as law, but belongs to a particular department of international law, it may be better to reserve the special discussion of the facts for an occasion in which the truth may be thoroughly investigated and ascertained, and here merely to consider the general objections to the nature of common consuetudinary international law before urged.

In the first place, then, while he admits (as, indeed, could not be denied) that "some of the consuetudinary rules of international law were uniformly practised at very remote periods or epochs, at least as far back as the ancient documents which have reached us afford certainty," M. Ortolan and his learned friends at the same time endeavour to depreciate the evidence of these ancient documents, by representing them as obscure, by adding the terms, "considering the obscurity of a past imperfectly known." And certainly we should never think of attempting to prove the present consuetudinary international law by documents so ancient as the twelfth, thirteenth, or fourteenth centuries. But we do no such thing; while M. Ortolan increases, if he does not create, the obscurity to which he objects, by keeping out of view all the subsequent clear evidence afforded by the internal statutes or legislative enactments of states, ordinances, proclamations, edicts, judicial determinations, writings of international jurists or national lawyers, and even by treaties themselves, which some nations, particularly the Dutch, found generally necessary, in order to set aside the then existing practice, and which, while they lasted, formed so many exceptions to the then existing general rule of law.

In the next place, it is objected generally that the original or more ancient rules of international law have been very often departed from, so frequently as materially to affect, if not to do away entirely, their obligatory validity. And as this objection to the nature of consuetudinary law involves a matter of fact, its truth may, of course, be ascertained by an investigation of the authentic historical records before referred to. But as the instance selected by M. Ortolan of an ancient rule of consuetu-



dinary international law is that of a rule or practice in a particular department of that law, namely, the maritime department during war, it may be better also to reserve the investigation of the truth of the assertion with regard to this particular rule for the occasion before alluded to, and confine our inquiry here to the general objection to international consuetudinary law.

Now, in this general point of view, it is plain that any ancient rule of that law may have been, or may be, in possibility, departed from, either generally, by civilised nations separately, of their own authority, and in common, but without the intervention of the consent of others, actually adopting a different rule; or partially and for a time, by a special compact between or among two or more contracting states agreeing by treaty to adopt such a different rule. With regard to the first of these modes of alteration and modification, it is equally plain the fact can only be ascertained by a thorough examination, not merely of conventional treaties, and of what are called diplomatic documents or treatises of jurists, or other historical documents, recording external intercourse and international usages, but also of the records of the internal institutions, statutes, legislative enactments, ordinances, judicial determinations of different states, including the writings of their lawyers, whether national or international. And with regard to the second mode of alteration or modification, if it is here merely meant that certain rules of ancient consuetudinary international law were subsequently departed from and altered, by and to the extent of the stipulations in certain treaties concluded among different nations during the two last centuries and the present, we have no occasion to enter into any argument on the point; for we never

doubted or called in question the title of two or more independent states to modify, by contract, their mutual intercourse, whether in peace or war, provided they did not interfere with the rights of other nations, or their title to concede and surrender almost all, though perhaps not all, their rights. As little did we ever think of disputing the authenticity of the treaties concluded among the European nations during the two last, or present centuries, or their validity, as establishing the legal rights and obligations of the contracting parties to the full extent of a sound and fair construction of the terms employed, and for the periods of duration either expressed or implied in the treaties, or determined by other legal considerations or supervening events. But beyond these admissions we denied, and still dispute, the legal validity of such treaties, either to bind nations who have not been parties to them, or to bind the contracting parties beyond the extent or duration of the treaties, or beyond this extent and duration to do away or supersede general common consuetudinary international law, resulting from the common constitution of mankind congregated into nations, from the circumstances in which they are placed, and from their previous uni-lateral acts, habits, and customs, the uniformity of which for ages indicates the consciousness and conviction of the people of their legality. To show that the pre-existing law was superseded generally by such treaties, it is manifestly necessary to prove, not only that these treaties were observed, which (for argument's sake) we shall concede, but also that these contracting nations adopted the same practice with reference to the other European nations with whom they did not contract. But this has not been proved ; and the

reverse may generally be proved by authentic evidence of the subsequent conduct of these contracting parties to these other nations.

As they could not legally, so the treaties of the seventeenth and eighteenth centuries before referred to did not *de facto* supersede the pre-existing international law, or nullify it, or render it inoperative with regard to other nations not included in the treaties. These treaties merely constituted exceptions from the pre-existing general rule ; and this appears both from the terms of the treaties themselves, when deliberately considered, and is also proved by the documentary evidence in existence, of the internal legislation and administration, and practice of the contracting parties, with regard to nations not included in the treaties, and by the testimonies of their own distinguished lawyers stating the practice of their respective countries, such as the Chevalier d'Abreu with respect to Spain, and Valin and Bouchaud with respect to France.

In the third place, M. Ortolan, with regard to the original or ancient rule of consuetudinary law, which he has selected for discussion, maintains that by the almost unanimous consent of the European nations, as expressed in the proposals, proclamations, treaties, and accessions to treaties, to which the appellation has been given of the Armed Neutrality, the original rule was abandoned, and the opposite one adopted ; and that this general accord of the great majority of the European nations ought to be held binding upon the small minority who declined the proposal, and chose to abide by the long established rule. That this mixed argument of fact and law is supported by exaggerated narration, and is destitute of foundation in law, has been and may probably

again be shown. But as it relates to a rule in a particular department of international law, namely, maritime international law during war, it may be better, as formerly, to reserve any farther remarks on this point for a future occasion.

In addition to, and immediately after the passage before quoted in part and referred to, M. Ortolan thus concludes his attack on common consuetudinary international law, (vol. ii. p. 439)—“ With respect to rules (*règles internationales*) thus changed or modified, in spite of the antiquity of the origin of these rules, perhaps in consequence of that antiquity, and notwithstanding the long space of time during which they have been followed, consuetudinary international law cannot be called common—for the word ‘common’ signifies followed by all—it becomes doubtful, vague, and insufficient. The means of obviating this vagueness and this insufficiency is to have recourse to the law which nations have made for themselves, by the express and often renewed stipulations of their written conventions—that is to say, to the positive conventional law resulting from public treaties.”

In this paragraph two positions appear to be maintained: that the rules of international law, being liable to change or modifications, cannot be called “common,” because they are not followed by all nations; and notwithstanding, or in consequence of their antiquity, become in the course of time doubtful, vague, and insufficient—for obviating which the only resource is the positive conventional law which, by treaties, nations have made for themselves. Whether, and how far, treaties denominated positive conventional law afford a solid basis for all other international law, we have already so

far seen, and will afterwards inquire more particularly. At present we shall confine ourselves to the observation that consuetudinary international law, being liable to change or modification, cannot be called common, because it is not followed by all; and, no doubt, if by all be meant all the nations, tribes, and communities dispersed over the surface of this globe, in Asia and Africa as well as in Europe and America, the consuetudinary law of nations cannot be said to be followed by all. But if, as usual, we limit the term "all" to civilised nations, those of Christendom, the European nations, and those who have emanated from them and now occupy America, we may, with sufficient propriety, say that consuetudinary international law—by which we mean not only the natural, but the positive, as the Germans call it, or the established, recognised, and practised law of nations—in being common to them all, resembles the internal common law of a people, at least more so than any other international law arising from treaties or conventions. And here we allude not merely to those more humane rules of the law of nations which have been introduced in modern Europe through the mild influence of Christianity, as so well explained by the late Mr Robert Plumer Ward, in his *History of the Law of Nations anterior to Grotius*, by Principal Robertson and other historians—such as the sparing of life on the surrender of arms, the non-reduction of prisoners of war into slavery, the abolition of the use of poisoned weapons, the good treatment and frequent exchange of prisoners of war, &c.;—we allude also to some later improvements, such as the abolition of paper blockades, at one time resorted to by Holland and England against the aggres-

sive policy of Louis XIV., but abandoned upon neutral remonstrances ; or as the unjust, but long-persevered-in practice of the French and Spanish governments, in confiscating neutral vessels because they carried hostile goods, and neutral goods because they were carried in hostile vessels. No dubiety, vagueness, or insufficiency arose from these changes and modifications, notwithstanding or in consequence of the antiquity of the customary rule which came to be observed.

With regard, again, to the propriety and correctness of the application to consuetudinary international law of the term "common," here disputed by M. Ortolan, we apprehend he mistakes the meaning of the term both in the ancient and modern languages of Europe, limiting it to what is effected through a simultaneous or contemporaneous joint agreement, or union of consent ; whereas the term implies also, if not its essential, its chief and ordinary signification as predicated of law—rules or courses of conduct, identical or similar, separately followed or adopted by different individuals in civil society, or by nations, whether contemporaneously or in succession by different generations. The *jus gentium* of the Romans, as contrasted with their peculiar *jus civile*, was the common law of mankind advanced to a certain degree in civilisation, although not emanating from any joint or simultaneous agreement. The rights and obligations which we formerly enumerated chiefly constitute the *jus gentium inter civitates, primum et secundarium* ; and that law is called common, from being common to, and as having been usually followed by, if not all nations barbarous and civilised, at least by all the civilised European nations and those emanating from them, and from

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## CHAPTER V.

### SECOND COMPONENT PART OR BRANCH OF INTERNATIONAL LAW, USUALLY CALLED THE CONVENTIONAL LAW OF NATIONS.

HAVING endeavoured to illustrate the basis, nature, distinctive character, and development of the first great component part or branch of the law of nations—namely, general, common, consuetudinary, international law, and noticed its evidence or records, we now proceed to the other great constituent part or branch of the law of nations—namely, particular conventional international law, established by public treaties between two or more states. And it seems to have been contended, that the doctrine we propounded in our first article, in tracing the third source of international law, is exceptionable, inasmuch as, if it does not deny the existence, it does not correctly estimate the value, narrows the limits, and does not recognise all the effects of conventional law. A simple perusal of what is stated, in tracing the third source of international law, is sufficient to show that, instead of denying the existence, we recognise the validity and great utility, occasionally, of the conventional law of nations. But the other objections it may be proper to examine and discuss more minutely and profoundly. And in doing so, it may be proper to consider the juridical nature of contracts between individuals, as

recognised and enforced in the internal law of states, or private civil law, as well as between independent states, usually denominated public treaties; noticing, particularly, the limits in point of duration, and the legal effects, or consequences, of such private contracts and public treaties. In this way, we may probably find, we shall be able to show that we have done ample justice to conventional international law, and that various modern jurists have gone too far in holding it to have, or involve, a legislative force beyond the consent of parties, and to afford evidence or proof of a sort of general consuetudinary international law, which it does not by any means prove, but in reality usually disproves, by showing it is itself an exception from the general rule previously followed in practice.

To begin with private contracts in the internal jurisprudence of states, it is not, perhaps, altogether clear whether the rule *pacta sunt servanda*, which is the foundation of all such contracts among individuals in civil life, as well as of all international treaties, although apparently long recognised as such, be really a *first truth*, and not resolvable into a more simple element. Some jurists hold, that contracts are legally binding, because each contracting party, by his promise or engagement, excites reasonable expectations of performance, and authorises the other party to make arrangements accordingly; therefore is not entitled to disappoint these expectations, and thereby occasion loss or damage to the other party—reparation or indemnification coming in the place of performance or fulfilment, when that has become impracticable. Other jurists hold that contracts are binding, because each involves the transference of a juridical

power, or right, over external substances, moveable or immoveable, or over the actions of other persons, and invests the opposite contracting party with the power of exercising that right, or at least deprives the promiser or undertaker of any farther disposal of the powers so transferred or alienated. Other still later jurists, such as the German authors Krug and Hegel, hold "that as soon as the contract is completed—namely, the promise or engagement has been accepted—the twofold or double wills of the promiser or undertaker, and of the acceptor, grow or become one will, to which the parties, having power to do so, have subjected themselves as the rule of their future actions; which rule reason must recognise as valid, as long as the contract is unfulfilled—that is, until what has been promised be performed or executed."\* The philosopher Kant, while he does not approve of the deductions of the jurists prior to his time, rests the legal validity of contracts upon a postulate of practical reason; which, as Warnkoenig observes,† translated into common or ordinary language, means nothing else than that the interest of right or justice, and of the social life of men, requires absolutely, or indispensably, that contracts be declared legally obligatory.

These views of different jurists certainly explain, some in a more, others in a less satisfactory mode, the grounds or reasons why contracts should be held legally binding, and physically enforced. But, as stated formerly, this inquiry seems scarcely necessary; for the

\* See Warnkoenig, "Rechts-philosophie," 1839, p. 374–379, § 176.

† Warnkoenig, p. 379. See also Austin's "Province of Jurisprudence determined," p. 365.

rule *pacta sunt servanda* always appeared to us to be intuitively apprehended and instinctively felt—that is, to be equivalent to one of the first truths of Buffier, or as an ultimate fact, in our nature, to fall under the common sense of Dr Reid and of Professor Dugald Stewart, as correctly and profoundly expounded by Professor Sir William Hamilton, Bart., in his recent publication, which he calls the *Philosophy of Common Sense*; resting, in short, upon the same or a similar basis or foundation as our belief in the existence of the external world, and in the ordinary course of nature. And without aiming at any further simplification of the basis on which conventional international law reposes, we willingly recognise the legal principle of *pacta sunt servanda*, in its broadest sense and to its full extent, to be liberally construed as a *Contractus bonæ fidei*, and as nearly, if not absolutely, co-ordinate with the legal principles, *Neminem ledere, suum cuique tribuere*.

As these observations, of course, do not aim at anything like a complete system, or theory, such as Dr Wheaton's work on international law, but are merely intended to correct some views which appear to us to be erroneous, but which seem of late years to have become more prevalent, and more extensively diffused on the Continent, we do not deem it necessary that in farther considering the juridical nature of contracts, either private or public, we should inquire into the mode or means by which they may be effectually entered into and concluded,—what are their general effects, or the rights and obligations thereby created,—and how they are terminated by fulfilment or otherwise. The only two points to which, on the present occasion, it may be proper to

attend, seem to be the influence or effect which contracts may have on third parties, or persons not included in the contract, either as principals or by accession ; and whether a contract be an act of such a juridical nature as to become the foundation of a general or common consuetudinary law, and as to indicate by its frequent, long-continued, and uniform repetition, a decided conviction in the mind of the people or nation that the rule which has thus been usually observed is the legal rule, resulting from the observed existing juridical relation, and therefore ought to be enforced.

Now, with regard to the first point, it does not appear to have ever been maintained, in the private jurisprudence of states, that any person is bound by a contract, unless he has given his consent, either expressly, *totidem verbis*, or by acts clearly inferring such consent ; or that any two persons can, by their contract, impose an obligation upon, or even bestow or establish a right or beneficial interest on, a third party, except in so far as they are concerned, and bind themselves. Any further investigation of this point, therefore, seems to be superfluous ; and it only remains to inquire, whether contracts, private or public, be of such a nature, in their character of acts, as to become the foundation and proof of a sort of vague and general, or common consuetudinary law. But to avoid repetitions, and to place the matter in a stronger light, by comparison or contrast, we shall delay the discussion of this point till we have considered a little more minutely the nature of public contracts, or treaties among nations.

## SECTION I.

*Difficulties and Uncertainties in the Conventional Law of Nations, as composed of Public Contracts or Treaties.*

In the preceding observations we conceive we have done, as we are quite disposed and indeed bound in duty to do, ample and complete justice to conventional international law.

But while we have, both formerly and now, admitted the validity and operation, and great utility in many cases of conventional international law to its full legitimate extent, we must protest against any attempt to enlarge its boundaries in the manner which appears to us to be implied in or indicated by the vague and rather ambiguous language employed by Martens and Klüber. In this our apprehension—in the interpretation we have thus put upon the expressions just alluded to—we are assured by M. Ortolan we are quite mistaken ; and certainly that author, in the 5th chapter of his first volume, does not venture to lay down any other doctrine than what we maintain,—namely, that treaties are binding only on those nations who consent and become parties to them, according to the sound and fair construction of their terms, for the specified or otherwise ascertained period of their endurance, and when not terminated by supervening circumstances and events. But, whether he is correct in the assurance he thus gives, and with what consistency he subsequently adheres to the general doctrine

so laid down by him, we shall inquire, after first investigating a little farther the true nature of what is called conventional law.

Conventional international law, according to M. Ortolan, is composed of the laws which nations have made for themselves. But this is not a correct view of the true nature of conventional international law. No majority of independent nations have a right, by their own acts, separate or joint, to bind, or, in other words, to legislate for, the minority ; precisely because they are independent, and have no superior on earth, except the omnipotent and all-wise Creator and Preserver of the universe. What is called the conventional law of nations is just the aggregate or accumulation of the treaties or conventions, among nations, which are still in existence and obligatory, and which have not ceased to endure, and become merely matter of history. When, in civil society, individuals enter into bargains or contracts, for the sale or transference, for a valuable consideration, of immoveable estates, or moveable goods, or for the lease or temporary possession of the former, or loan of the latter, we cannot say with propriety of language, they have made so many laws ; we can merely say with propriety, they have, by contract, acquired so many rights, and undertaken so many obligations, which the law, the legislative and judicial powers, cause to be observed and performed. In the same way, by treaties nations merely confirm or surrender, or transfer pre-existing rights or obligations, or convert what was formerly indifferent, optional, or discretionary, a matter of choice, into what is legally necessary and susceptible of enforcement ; thereby creating a legal right in the one, and a legal obligation on the other.



When there is a pre-existing legal right or obligation, in the nature of things, arising from a pre-existing juridical relation, or which has been induced and brought about by the uni-lateral acts of nations, without any joint agreement of two or more of them, the treaty merely confirms the right or obligation, which, as it did before, continues to exist in perpetuity, independently of the treaty. But such treaties, merely confirmatory of the pre-existing right or obligation, without any ulterior object of specification, limitation, or modification, are rare ; and when the subject of the treaty is previously indifferent, or matter of choice, optional or discretionary, the right created, or obligation undertaken, by the treaty or contract, cannot go beyond or exceed the terms and limits of the contract, or the parties who originally entered into it or acceded to it.

*Greater Difficulties and Uncertainties in Public Treaties, or National Conventions, than in Private Contracts in the Internal Jurisprudence of States.*

But besides conventional international law, not being composed of legislative acts, which nations have made for themselves, and besides their being subject to the same rules of law as private contracts among individuals living in the social state, as recognised in the internal civil and criminal jurisprudence of each people, public treaties among nations are liable to various other difficulties and uncertainties, from the want of the legislative and judicial coercive power exercised by the community ; and from various points in their construction or interpretation not

being fixed and settled in the same definite manner, as in the internal private law of states. And with regard to these points of difficulty and uncertainty, it may be proper, first, to notice shortly the views given by the latest, and generally considered most eminent, international jurists, as, if not solving the difficulties, at least exhibiting the most improved state of the established conventional law of nations as existing at present.

*Martens and Klüber.*—Of these recent international jurists, Professor Heffter of Berlin is one of the latest, and certainly one of the ablest. But as Martens and Klüber both preceded him, by sixty and thirty years, we shall begin with making a few extracts from their works. And their admissions show how little conventions and treaties are to be considered as forming a stable or permanent part of international law. Thus in his *Précis du Droit des Gens Moderne de l'Europe*, 1820, liv. ii. chap. 2., Martens lays down the following doctrines :—Section 52. “That the right of self-preservation authorises a nation to depart from a treaty, which it can no longer execute without causing its own ruin or material loss, (*sa propre perte.*)”—Section 53. “That treaties are not obligatory which are morally impracticable, or of which the execution would injure the rights of a third party ; that of two treaties concluded with different nations, if incompatible with each other, the most ancient must be preferred, reserving any indemnification which may be due to the other nation.”—Section 63. “That the experience of all ages proves, nations are usually more disposed to conclude treaties than to fulfil them ; and that accessory or auxiliary means were early resorted to for securing their observance, such as the sanction of an oath, pledges, hostages,” &c.

Again, in liv. ix., Martens lays down the following doctrines :—Section 342. “ That a treaty expires when the resolute condition exists, or when the time for which it is concluded has elapsed, unless it has been renewed or prolonged, expressly or tacitly ; and that there exists in Europe a much greater number of treaties only tacitly prolonged than could reasonably have been expected or believed, considering the importance of the object ; that the total change of the circumstances which have been the cause of the convention renders it invalid ; that the same rule holds if the object of the convention perishes or changes ; that in simple, imperfect, or not legally exigible customary rights, each power reserves the right to abolish them, or to depart from them, provided it gives previous notice in due time ; and, *à fortiori*, the mutual consent of nations may abolish or change points of simple or mere practice.” In liv. ii. chap. 2., Martens farther states, section 65, “ that in tacit conventions the consent of the two parties, or of one of them, is inferred from acts which afford the proof of it ; that a variety of acts may serve as proof of consent for a present case ; that it is much more difficult to find acts sufficient to prove an engagement for future and successive prestations or acts to be performed : that, to attribute this force, it is necessary, at least, that they have been undertaken not only freely, and in the knowledge of the cause, but likewise in the well-founded conviction of being obliged to undertake them ; or that they be of such a nature, that the uniformity of conduct for the future may be a necessary consequence of that which has been once observed ; that, under such conditions, a single act may prove the tacit consent—but the proof is strengthened

by the frequent repetition of these acts ; that the smallest part of the law of nations rests upon tacit conventions."

In the same way, in his *Droit des Gens Moderne de l'Europe*, Part ii., tit. 2., Klüber states, section 154, that the renewal of treaties, or a prorogation of their validity beyond the stipulated term, is subject to the same conditions essentially requisite for the original conclusion, and is not of itself to be presumed, but may take place tacitly, if, after the term has elapsed, the parties continue knowingly and with deliberate purpose to fulfil the conventional obligations, and to accept the performance of them. And in Part ii., tit. 2., sections 164, 165, Klüber states, "that public treaties cease to be obligatory : 1. By the mutual consent of the parties interested ; 2. When one of the parties, in virtue of a reserved faculty, departs from the convention ; 3. By the lapse of the stipulated period ; 4. By the attainment of the end, the sole object of the treaty ; 5. When the execution of the treaty becomes physically or morally impossible ; 6. When there is an essential change in a circumstance of which the existence was supposed to be necessary by both parties, whether expressly or according to the nature of the treaty ; 7. By the (defection) default of one of the parties, who refuses the execution of the treaty in question, or even of another quite different ; 8. By the complete and entire accomplishment or fulfilment of the obligations which are the subject of the treaty—the consequences remaining established between the contracting parties, notwithstanding supervening changes in the situation of affairs."

In short, it may perhaps be considered as definitively

settled, that treaties bind all the parties who originally contracted, or subsequently acceded to them ; that treaties last for the period specified in them, unless otherwise legally terminated, but cease upon the expiration of that period, unless expressly renewed, so far as regards obligations still to be performed in future ; that conditional treaties are dependent upon the existence or fulfilment of that condition ; that stipulations or provisions applicable to a state of war must be held valid and binding, notwithstanding a rupture, at least during the first ensuing war, though not afterwards, when extinguished by hostilities, unless expressly renewed. But beside these, and a few other universally recognised rules, there is great vagueness, uncertainty, and doubt in the construction of treaties. For the validity of treaties, the interposition of free and voluntary consent is on all hands deemed essential. And in treaties of commerce, and other treaties made during peace, free consent—of course influenced by interested national views, usually called patriotic—actually takes place. But in treaties of peace, the consent given has been sometimes alleged and contended to have been compulsory, and not free, in consequence of the comparative state of weakness, want, and depression to which the one belligerent may have been reduced by the events of the war just terminated.

*Heffter.*—We proceed to Professor Heffter of Berlin, who appears to us to be a more acute and profound jurist than either Martens or Klüber, and who, although deprived, by his death, of the assistance of his intended collaborateur, the (in Germany) celebrated M. Gans, himself completed, and in 1844 published, the contemplated joint work, entitled *Das Europäische Völkerrecht der*

*Gegenwart*, the present international law of Europe. In section 81 of this work, Heffter thus treats concisely of the obligations of treaties in the law of nations :—" At all times, and among rude as well as civilised nations, treaties without any common statutory rule have been used or employed as the lawful means of binding or imposing obligations ; yet, nevertheless, they have never been solely relied on. In ancient times, mankind took to their aid religion and the dread of supernatural power, in order to give them greater strength. But since even these means were often found insufficient, the naked belief in the self-validity of treaties still fortunately remained, and was confirmed through Christianity, as through the positive law—finally, too, through philosophy. But although practice has not seldom raised the question, it has never been made clearly intelligible whether, wherefore, and how far, a treaty bound, or was clearly obligatory through itself.—Another view which has been taken of this matter it is difficult to defend—namely, that a treaty, *duorum vel plurium in idem consensus*, in itself, only establishes the law or right through the unity of the wills—consequently, also, only so long as this unity lasts or endures ; and that, in the case of a change of will in one of the parties, the other is only entitled to demand the restoration of the previous condition or state, including reparation for the loss or damage which he has sustained in the rights hitherto belonging to him, from his having honestly subjected himself to the will of the other contracting party."

" It is only the general will, supported upon equal general interests and equal moral sentiments, which can establish, according to the contract of individuals, a

legally or juridically binding obligation, for the direct and lasting fulfilment of that which has been promised or undertaken. For that purpose, however, the state alone possesses in itself the means of enforcement: for individuals, in international law, such compulsory or coercive power is wanting. The treaty has here, therefore, only the declared natural force and signification. It finds a particular support only in the reciprocal interests of states, through its constant mediation, to remain in traffic or commerce with other states, and to acquire new rights. It receives a still greater guarantee in a system of states, such as the European is, which, in itself, rests upon reciprocity and an agreement of wills; to which, consequently, a state can only belong if it recognises those fundamental principles of the binding power of treaties which are consistent with the interests of all, and without which, generally, no confidence or credit, no commerce, is conceivable. Certainly, therefore, the treaties of nations amount to something, even although they may want the sanction of private law. *Pacta sunt servanda*, nevertheless, still remains a chief fundamental rule of the law of nations. Only circumstances give to conventional international law a certain singularity or peculiarity; there is in it, too, a great looseness or laxity of fulfilment."

Again, while he remarks that states, like individual men, spring up, grow to manhood, become aged, decay, and disappear, Professor Heffter very properly qualifies the doctrine of the earlier international jurists, Grotius and Pufendorff, that "*res publica est æterna, universitas non moritur*," by observing "that the state is immortal only in its conception, (*und als motif*), and at the most

in the sense that it is not dependent upon the physical existence of certain determinate individuals, as members, but exists as long as members are reproduced in it." \* Indeed, we do not think that, according to experience and in correct language, the quality of immortality can be predicated of a state ; admitting, however, the universally recognised maxim, that a nation has a permanent or indefinitely perpetual existence, and continues, in the eye of law, to be the same identical nation, to have the same capacity and enjoyment of rights, and the same liability and subjection to obligations, notwithstanding the complete change in the individual members composing it, which it may have undergone in the course of successive generations ; and notwithstanding even extreme changes in the form of its internal government.

But does it follow from this, that rights acquired, or obligations undertaken by treaties in general, if the term of their duration be not specially limited, or if they do not contain conditions or stipulations fixing that point, last in perpetuity for centuries to come, notwithstanding the lapse of time and non-exercise, and notwithstanding supervening events changing the circumstances and relative position of the contracting parties ? Is the convention, that the stipulations and engagements contained in the treaty shall be binding in perpetuity, unless the parties mutually agree to retract or modify them, valid and effectual in law ? Are the stipulations of "peace and amity *for ever*," frequently inserted by diplomatists in treaties of peace, of any avail in law, or mere matter of form and surplusage ? Are they not rather insignificant,

\* "Das Europäische Völkerrecht der Gegenwart," § 24. Berlin, 1844.



if not absurd? Is the following doctrine of the recent international jurist, the Portuguese ex-minister for Foreign Affairs,\* well founded?—"Treaties bind nations only so long as the principle upon which their validity rests continues to exist; that is to say, so long as, from the conscientious and exact fulfilment of the obligations which it imposes on each of the two parties, there does not result to either lesion, or damage, or loss, which the one cannot avoid, and for which the other cannot indemnify it. According to the internal civil law of states, this is the case of rescinding, *bonâ fide*, every contract between individuals; and when they cannot agree between or among themselves, the intervention of the law of the state is not called upon by them to annul the contract, which no authority could annihilate, but to declare whether, in fact, the lesion or damage alleged by the one of the two parties which asks or requires to be allowed to resile has actually taken place."

In his exposition of the duration and termination of public treaties, Professor Heffter, in section 99, p. 174-6, gives the following enumeration of the modes in which the obligations of treaties legally expire or become extinct:—"First, through actual fulfilment, when they proceed upon certain acts of performance, to be at once completely executed, not continuing or enduring. Secondly, through the insertion of a resolute condition; and through the lapse of the previously arranged period. Thirdly, through a uni-lateral warning or intimation, duly given and made known, when there was a provision to that effect. Fourthly, through a renunciation or aban-

\* M. Pinheiro Ferreira, "Notes sur Droit des Gens Moderne de l'Europe, par Martens," vol. i. p. 390.

donment, duly declared by the party who alone is entitled to insist for performance. Fifthly, through the reciprocal revocation or abrogation of a bi-lateral treaty, which itself no third party can prevent. Sixthly, through the total destruction of the object, upon which the contract proceeds, so far as therein no fault or blame is imputable or attaches to any party. Seventhly, through the extinction or annihilation of the subject or party entitled or bound by the contract, without another legally, or according to the analogy of the treaty, coming in his place. Finally, there arises or takes place, if not always a complete extinction or annihilation, yet a suspension of the obligations of treaties, through the occurrence or intervention between the contracting parties of a general or complete, not merely a partial state of war ; unless the treaty be expressly concluded with a view to the duration or period of war—a consequence which will be justified in the sequel, by a nearer examination of the right import or meaning of war. At the same time every treaty, in itself extinguished, may be again revived by an express or tacit renewal, only the renewal is here itself the rule for the future, and is, therefore, in all respects a valid treaty, binding in its provisions and stipulations. A tacit renewal must accordingly also have for itself a completely discernible and unequivocal mark or criterion, by which to judge and ascertain that it is the view of the parties to allow the earlier treaty to continue in force generally, and in all its arrangements ; otherwise a continued performance and acceptance of what might have been demanded or required, from the earlier treaty, is only to be considered as a single factum existing for itself.”

In illustration of the last-mentioned mode in which

treaties are terminated, viz., by general and complete hostilities, Professor Heffter proceeds as follows :—\*

“ The next effect of the breaking out of a war is the actual suspension of every juridical relation during peace, and of all intercourse and commerce between the belligerent powers ; for the judicial administration and enforcement of justice is now no longer possible ; the war claims for itself all the means, faculties, and energy of the nation.

“ On the other hand, it cannot be maintained, at least not according to the principles of the more recent law of war, that the war juridically, or legally, dissolves or extinguishes every legal bond or tie between the contending parties, and leaves such legal bonds or ties to arise of new, as if for the first time, through the succeeding peace ; for, although every war puts at stake or in hazard or danger the existence of a state, the mere possibility of ruin or destruction is still not equivalent to actual destruction itself. Farther, those obligations from treaties, too, which are expressly undertaken with a view, or extended, to the case of a war, have an enduring validity so long as no party is guilty of any injurious act, and thereby entitles the other to abrogate absolutely the obligation, or at least to suspend the same by way of reprisal ; for, till this takes place, there exists presumptively a unity of wills, the foundation of the obligations of treaties.”

Further, in section 181, p. 304, Professor Heffter thus lays down the law :—“ All obligations from treaties, of which the fulfilment was at first only to take place in future, in which also a change of will was still possible, in

\* “ Das Europäische Völkerrecht,” § 122, p. 206.

reference to the obligation undertaken, become doubtful and insecure through the breaking out of a war ; so that they require for their farther validity a confirmation and ratification, by a new, plain, and clear declaration of will."

*Pinheiro Ferreira.*—Further, in his *Précis du Droit des Gens Moderne de l'Europe*, section 58, Martens had thus stated the law :—" In all cases of a war breaking out between the contracting parties, treaties, although made for ever, fall of themselves, with the exception of the articles contemplating the case of the rupture." And in his notes on the work of Martens, vol. i. p. 390, M. Pinheiro Ferreira, late Minister for Foreign Affairs in Portugal, agreeing with Professor Heffter, confirms this doctrine, limiting the necessity for a clear, express, and special renewal to the obligations of which the performance at the time of the rupture were only to take place in future ; and referring for the reasons of this to his own *Cours de Droit Public*, section 45, which reasons, he observes, M. Martens has not given.

We have thus noticed a number of the difficulties and uncertainties to which the conventional law of nations, as composed of public treaties, is liable, in addition to what are found to exist in private contracts between individuals, in the internal jurisprudence of states. We have also endeavoured to ascertain how these questions are to be decided according to the most recent authorities. But until most of these questions can be answered satisfactorily, to the conviction of the educated or intelligent portion of mankind generally, and until it be ascertained, by rigid and impartial investigation, which of the treaties concluded among the different European independent states, in the course of the present and two preceding

centuries, are now in force and obligatory on independent states—not mere matters of history—the conventional law of nations, although highly useful in various departments, as supplementary, will, if adopted as now proposed, be found but a lame substitute, as a whole, for the common consuetudinary law of nations.

## SECTION II.

### *Errors in over-estimating the legal Effects of public Treaties.*

In the preceding observations we have seen that the particular conventional law of nations, composed of treaties, is, as a whole, defective as a legislative code, and very insufficient and uncertain in extent and duration ; and that, although useful as a supplement in various cases, it affords but an unstable foundation, if substituted as a basis, for general or common consuetudinary international law, which rests on the juridical or legal relations established by the omnipotent and all-wise Creator in the physical, corporeal, and mental constitution of mankind—in the physical material situation and circumstances in which He has placed the human race on the surface of this earth, in the course of the physical material and physical mental—excluding moral events, to which he has subjected them in this world—and in the consequences of the delegated powers of action, which he has bestowed upon societies of men, or communities, or states, as well as upon individuals. But farther, the operation and effects of the conventional law of nations have been greatly

over-estimated and exaggerated by various jurists, and many very learned and able writers have fallen into what appear, upon more thorough investigation, to be errors, in the effects they ascribe to public treaties. One description of errors consists in holding particular conventions or treaties to be almost the sole evidence of, and to form almost exclusively the whole of, international law ; and, if not to constitute it originally, at least to alter and modify and recast it from time to time. Another description of error consists in holding a series or succession of treaties among two or more nations, containing certain stipulations, as recognising certain principles or rules, and establishing them in future, to the effect of being legally obligatory on nations who have never made or agreed to such stipulations, or who have done so only for a time, or with regard to particular nations, from particular considerations.

The first of these errors consists not merely in holding treaties to afford evidence of the actual performance of obligations, whereas they merely afford evidence of engagements to perform obligations, which occasionally have not been fulfilled, but also and chiefly in holding treaties to afford almost the only and sole evidence of international law, to the exclusion and neglect of almost all other historical records ; whereas the true and real evidence of general international law, usage, and practice, is to be found in the records of the national institutions, government, administration, and practice of each independent state ; while treaties, though sometimes confirmatory of pre-existing rules of the common law, are usually merely exceptions from the previous general rule. We formerly pointed out in detail the records and evidence of the

general and common consuetudinary law of nations ; on the other hand, the records and evidence of particular conventional international law, of course, exist in the various collections of treaties among modern civilised nations ; and to the Germans, chiefly, we are indebted for the construction, or creation in a manner, of the diplomatic code. The idea appears to have originated with Leibnitz, in his *Codex Diplomaticus*. Various large similar collections were made in Holland by Dumont, Rousset, and others, and in England by Rymer, Jenkinson, Chalmers, and others. But the collection of treaties and other state papers connected with international law, and the arrangement of the contents of those documents into a system, continued to be prosecuted with the greatest zeal and success in Germany. This appears from the "*Vernunft und Völkerrecht*" of Glafey, the "*Beytrage zu dem neueste Europäischen Völkerrecht*" of Moser, the "*Codex Juris Gentium*" of Schmauss, and the "*Codex Juris Gentium*" of Wenck, the "*Literatur des Völkerrecht*" of Von Ompteda and Kamptz, and the "*Recueil des Traités*" of Von Martens, of which last the supplement far exceeds the original in number of volumes, and has been brought down to the present times. And with regard to the systematic works, or what the later German jurists have called the *Droit des Gens moderne de l'Europe*, we may mention the treatises of Günther, Martens, Schmalz, Klüber, Schmelzing, and Heffter.

But, however much we may be indebted to the recent German, and also Italian jurists, such as Professor Lampredi of Pisa, for their systematic treatises on international law, we cannot admit the soundness and accuracy of the views entertained by some of them, with regard to the

limits and extent of the legal operation and effect of the conventional treaties of nations. In the few preceding observations, we have stated what appears to be the true extent of the legal operation of such treaties; and it is both extensive and great. But we cannot admit that such treaties between two, or among several nations, constitute a general common positive or established international law, or have legal validity, beyond the terms and duration of these treaties, or beyond the nations who are parties to them. The earlier international jurists, such as Grotius, Loccenius, and Bynkershoek, appear to have marked distinctly the difference in point of nature and effect between what they called the natural or common consuetudinary law of nations, and conventional law founded on treaties. But several of the later jurists appear to have mixed or confounded the two, so as not to form separate parts of a whole, which would have been quite correct, but so as to identify, or rather amalgamate, the two, and so as in a manner to substitute the latter for the former, or at least to recognise the latter very much to the exclusion of the former. The expressions of Voet are ambiguous, but rather imply that he understood the treaties between Holland and France, and some other states, to constitute the general and common, as well as the particular international law of Europe. From the recent work of M. T. Ortolan, formerly alluded to, entitled *Règles Internationales*, this is obviously the aim and object of the eminent French lawyers whom he says he consulted. Nay, perhaps, even our English great jurists are not altogether exempt from this animadversion. Sir Dudley Ryder, and Mr Murray, afterwards Lord Mansfield, in their answer to the celebrated memorial of



King Frederick II. of Prussia, about the middle of last century, appear to found too much upon treaties, as constituting or proving, not merely the particular conventional, but also the general and common consuetudinary law of the European nations. Azuni, in his *Droit Maritime de l'Europe*, published in 1805, tom. ii. pp. 40, 41, seems to consider the work of Professor Lampredi, of the University of Pisa, entitled *Del Commercio dei Popoli Neutrali in Tempo di Guerra*, published at Florence in 1788, as left unfinished and incomplete, because he does not propound a system composed both of the general and common consuetudinary law, and of the particular and conventional law of nations, mixed up together. But to us it rather appears Lampredi acted wisely in not mixing up together these frequently heterogeneous and discordant elements, and in dividing his treatise into two distinct parts, the first embracing the general or common consuetudinary law of nations, and the second the conventional law of nations, as sometimes confirming, but usually departing from, or modifying the former.

From what cause, or how, the error of more modern jurists arose, in confining their attention almost entirely to treaties between or among nations, and omitting the equally authentic and authoritative records of the internal legislation and administration of states towards foreign nations, in their historical narratives of international law, it is not easy to explain—except, perhaps, that it arose from the ponderous collection of treaties, and other such state papers, made at first chiefly in Holland, and afterwards in Germany, after the example set by and the recommendation of Leibnitz, affording a more easy and simple task for methodical arrangement of their contents

than the comparatively difficult task, requiring more acute discernment, of tracing the practice of the common law of nations from their own internal establishments and usages in their actual intercourse with foreign states ; or that it arose from uni-lateral views, and partial and overweening patriotic zeal, to represent as actually existing, or to aid in bringing about, a state of international law favourable to the peculiar interests of their native country. But to show that our observation is founded in fact, we shall select, in an interesting branch of international law—viz. the maritime law of nations during war—the example of one of the latest and best historical jurists, whose general fairness and impartiality, and strict regard to truth, preclude the suspicion of his being influenced in his historical narrative by any narrow, contracted views of peculiar selfish national interest.

Thus, even the able and learned M. Schoell, in his greatly enlarged and improved continuation and recast of the *Histoire des Traités de Paix*, commenced by M. Koch, has so far fallen into the error here alluded to, in making a division of the progress of maritime international law into a variety of different periods or epochs, founded solely on alleged changes of what appears to have been the original or earliest practice among the European nations, in consequence of several particular treaties having, in the course of the two last centuries, been entered into by certain individual nations, without taking into view or account the general practice of these very nations towards other states during the subsistence of these very treaties, and contrary to, or different from, the stipulations contained in them, as the said practice is evinced by the internal legislative or administrative regu-

lations of the states or governments who had entered into these treaties, the judgments of their tribunals, and the writings of their jurists; and also in consequence of several particular internal ordinances established by one or two great nations, who, however powerful, could not justly or legally affect the rights of other separate and independent states. But such partial and scanty evidence, collected, or rather selected, from a few scattered treaties, without ascertaining the progressive conduct generally of each nation from its own records, or from the arbitrary ordinances of a powerful nation, is quite defective and insufficient for the establishment and composition of a correct and true narrative of the progressive advancement of international law.

Thus, in his theory, the earliest practical rule in maritime war, as proved by the *Consolato del Mare*, and other authorities cited by M. Pardessus in his *Collection des Loix Maritimes*, tom. ii. pp. 122, 125, 303, by which an injured belligerent was entitled to seize at sea the vessels and cargoes of his enemy, and also the goods belonging to the enemy, although carried in neutral vessels, upon reimbursement to the neutral shipowner of the freight due to him, but not neutral goods although on board hostile vessels, is held by M. Schoell to have been changed by a treaty, in 1417, between Henry V., King of England, and John the Fearless, Duke of Burgundy, by which it was agreed that neutral goods on board a hostile vessel should be good prize; and by an ordinance of Francis I., King of France, in 1543, by which hostile goods on board neutral vessels were held to render not only the remainder of the cargo, though neutral, but also the neutral vessel itself, liable to confis-

cation. Yet it is abundantly obvious that this treaty merely altered, and could only alter, the previous state of the law and practice between England and Burgundy, so long as it lasted, while the practice of other nations, such as Denmark, Sweden, the Hanse Towns, Scotland, Spain, Venice, Genoa, &c., remained the same as formerly, and the practice even of England and Burgundy towards these other nations also remained the same. And it is equally manifest an ordonnance of the King of France could merely affect the French practice, while it proved against that government an aggravated deviation from the previous usage.

Again, M. Schoell distinguishes a third epoch of maritime international law, upon the following very defective evidence afforded by detached national conventions :—A public document by which the Turkish government agreed, in 1604, that hostile goods on board French vessels should not be confiscated ; a treaty, in 1646, by which France granted a similar favour to Holland for four years, and afterwards granted, or refused, that indulgence at pleasure ; a public document by which Holland obtained from the Ottoman Porte the recognition of the old rule of the *Consolato del Mare*, by which neutral property was respected, though on board hostile vessels ; a treaty in 1630, obtained from Spain by Holland, by which all Dutch goods in hostile vessels were to be confiscated, but all goods on board Dutch vessels, though belonging to the enemies of Spain were to be free ; treaties between England and Portugal in 1642 and 1654, between England and France in 1655 and 1677, between England and Spain in 1667 and 1670, and between England and Holland in 1667 and 1674, by

which it was agreed, very much in consequence of the interested urgency of Holland, that the neutral flag should protect hostile goods. But these temporary arrangements, on particular occasions, between individual nations, did not alter the general rule recognised in previous practice, and founded on the obvious and almost intuitively apprehended maxim of right, that a belligerent who has been provoked by injury is entitled to enforce his rights against his enemy by seizing his goods, whether in his own country or on the high seas. And, accordingly, in point of fact, the practice of the different nations just mentioned, towards others than the opposite contracting parties, continued, notwithstanding these treaties, to be the same as formerly, as appears from their own internal regulations, records, and works of their writers, such as Loccenius, Bynkershoek, D'Abreu, Valin ; and no such treaties were entered into by England, with the northern kingdoms of Denmark and Sweden.

Proceeding in the same course of inconsequential deductions from premises inadequate in point of fact, M. Schoell represents the celebrated *Ordonnance de la Marine* of Louis XIV. in 1681, as constituting a fourth epoch of maritime international law ; as if the legislative enactment of any single nation could constitute a body of international law, obligatory on all the other independent states of Europe. In the same vague and inaccurate mode of apparently holding treaties absolutely and conclusively to constitute international law, and to set aside not only previous practice, but to annul legal principles, M. Schoell next distinguishes the Treaty of Utrecht, in 1713, as forming a fifth epoch in international law, and establishing the rule that

the neutral flag protects the hostile cargo. But this is another deduction unwarranted by the premises. The treaty of Utrecht in 1713 between France on the one side and Great Britain and Holland on the other, no doubt, in consequence of the influence possessed by Holland at that period, sanctioned the rule just mentioned ; and so long as that treaty remained in force, the parties who so contracted were of course bound to observe this rule towards each other. But that this treaty was *not* intended to establish, and did not establish, that rule, as general common international law, is manifest from the fact of the stipulation being inserted only in the treaties between Great Britain and Holland on the one side, and France on the other, and from its not being included in the other treaties, which are usually denominated the Treaty of Utrecht—such as the treaty of 1713, between Spain and Great Britain, and between Spain and France—or extended in any way to the northern kingdoms and states of the Baltic, or to the southern states of the Mediterranean and Adriatic. The eminent Spanish and French jurists of last century, also D'Abreu and Valin, clearly prove that such treaties merely constituted exceptions from, but did not permanently change, the general rule and practice observed by these nations.

Finally, upon the same erroneous theory of holding treaties or special contracts between particular nations to constitute, and from time to time to alter and form of new general or common international law, M. Schoell represents, as a sixth epoch in the progress of that law, the French Réglement of 1744, which so modified the practice of France as to declare that hostile goods on

board neutral vessels should, as formerly, be confiscated, but that the neutral vessels should be released. He notices also, under this epoch, certain treaties between France and other states, in the earlier part of the eighteenth century, and inquires into the changes in French practice. But into this detail it is unnecessary to follow him, since these treaties could only bind the nations who were parties to them, and could not, any more than French practice, of itself, constitute common international law.

So much for the evidence of the class of errors we have just been considering—those of exaggerating the extent and effects of the conventional law of nations, by assuming treaties between or among nations as chiefly, if not wholly, constituting and affording evidence of the existence and of the successive alterations of the general and common consuetudinary law of nations, as well as of the particular conventional law of nations, or *jus pactitium*,—of omitting all notice of the contemporary different practice of the contracting parties themselves towards the other nations, with whom no such treaties have been entered into ; and of passing over in silence the temporary nature of treaties, and the various events and accidents by which they may be legally extinguished and terminated.

We next proceed to the other class or description of errors before alluded to.

## SECTION III.

*Farther Error in over-estimating the Legal Operation and Effects of Public Treaties.*

We proceed now to the second class of errors to which we formerly alluded, and by which a series of stipulations and engagements in a succession of treaties, between or among certain nations individually, is held to establish general rules binding upon other nations who have not been parties to these treaties, or only for a certain period, and for certain considerations, and upon certain conditions. And against such errors it is of importance to be on our guard, because their tendency and effect is to convert the conventional law of nations, which is, from its very nature, a particular law, into a general or common international law, and to give to the conventional law of nations, if not a legislative or statutory force, at least a legal obligatory force ; such as to bind nations to what are matters of free choice, or option, and to which they have never given their unqualified consent, so as to render the operation of the principle *Pacta sunt servanda* at all applicable.

Thus, as formerly noticed, some later German writers, such as Martens and Klüber, appear to have endeavoured still farther to enlarge the conventional law of nations, by creating out of separate treaties, or, by what they term analogy, deducing from various similar stipulations in treaties, a body of international law which seems to be held out as of perpetual duration, without regard to



the duration of the treaties from which it is derived, and to be binding on all other nations, whether they may have been originally, or may have continued, parties to these treaties or not. Although neither Martens nor Klüber were acute and profound lawyers, such as Hugo or Savigny, they were very learned and industrious men; and as their abridgements *Du Droit des Gens Moderne de l'Europe* are of a convenient size, and in the hands of the diplomatic public, it is necessary to investigate more narrowly what the rather vague and somewhat mystical doctrine maintained by them really is, and what is the evidence of it; especially as some later and more able writers have availed themselves of it, probably from patriotic motives, to support rules of maritime warfare which are favourable for the peculiar or particular and temporary interests of their country.

In 1776, the Abbé de Mably, in the preface to a new edition of his work, entitled *Le Droit Public de l'Europe, fondé sur les Traités*, rather pompously announced treaties or conventions as the ground or foundation, or chief source, of European international law. "Tout le monde sçait, que les traités sont les archives des nations, qu'ils renferment les titres de tous les peuples, les engagements reciproques qui les lient, les loix qu'ils se sont imposées, les droits qu'ils ont acquis ou perdus. Il est, se je ne me trompe, peu de connoissances aussi importantes que celle-là pour des hommes d'état, et même pour de simples citoyens, s'ils sçavent penser; il en est peu, cependant, qui soient plus negligées." But this is little else than an elegant and impressive mode of enunciating a truism. Everybody knows that the conventions, or agreements, which nations make with each other are recorded in

treaties. But the passage just quoted is quite vague, and contains no distinct information why, or how, or to what extent, if any, they constitute a part of international law, beyond the special stipulations which they contain, as binding the contracting parties while the treaty endures.

That treaties between or among two or more nations are binding, for the period of their duration, upon the contracting parties, and constitute the law between or among them in all matters embraced by the treaty, there can be no dispute. But beyond this, whether or not, or to what extent, do such treaties go? Do they constitute international law with reference to nations who never entered into any similar treaties, or who, at least, are not parties to the treaty in question? For what period, too, when not specified, are such treaties binding even upon the contracting parties? Does a breach of the treaty on the part of one of the nations dissolve the conventional obligations undertaken by the opposite or other parties? What subsequent injurious conduct, if any, is sufficient to liberate either or any of the contracting parties from the reciprocal rights and obligations thus expressly undertaken by them?

That the practical system of international law, recognised in modern Europe, is much affected by the treaties which individual nations conclude with each other, and that such treaties, so far as still in force, are to be consulted in the first place as authorities, there can be no doubt. But beyond the rights and obligations thereby conferred or imposed, the inquiry is—how far are such treaties binding on other nations?

The practical system of rules or modes of international reciprocal conduct, now recognised as positive or estab-

lished international law by the civilised states of modern Europe, we have seen, has chiefly arisen or grown up from time to time, in the course of the experience of generations and ages, and of the progressive advancement of nations in their peaceful, commercial, and warlike intercourse, and has come in time to be embodied in customs and usages—in other words, in the habitual repetition of the same or similar acts, indicating and proving the intuitive perception or apprehension, by the populations of different countries and states, of the more simple, and the gradual discovery and conviction of the more complicated, juridical or legal relations of nations, and of the thence resulting rights and obligations of nations towards each other. And, as the Prussian Professor Schmalz observes,\* “to give to the body of modern practical international law a scientific form, it is not enough to arrange in order the materials which history furnishes; it is necessary also to search therein for the notions which serve as guides to unfold those rules, as derived from the fundamental principles of right and justice, to illustrate their application in detail, and thus to solve difficulties, and to find precedents for such new cases as may probably occur in future.” In the same way as general history appears to do, the treaties of particular nations with each other, as being the records of such events, may, beside the particular rights and obligations thereby conferred or imposed, contribute indirectly to practical international law, by showing what matters and rules have been held as requiring particular stipulation, or as otherwise generally observed, under the

\* Schmalz, “Europäische Völkerrecht,” Buch i. § 28.

influence of those common inward convictions and feelings of compulsory justice and legal right, which arise in the minds of the individuals of whom a people is composed, and form the basis of what is called the natural, or the general and common, consuetudinary law of nations. But beyond this the treaties among the different European nations do not appear to contribute to the general positive or established international law of Europe, or to constitute of themselves component parts of that law, beyond the rights and obligations which they bestow or impose on the contracting parties.

Although, however, it seems manifest that treaties, of themselves, only bind the contracting parties, and although it appears, from the preceding quotations from several of the latest writers on the subject, that the international law, or *Droit des Gens de l'Europe*, so far as it is derived from or dependent on treaties, is by no means of a stable or permanent nature, and is liable to vicissitudes from these treaties ceasing, upon various grounds, to be obligatory, yet Martens, and after him Klüber, appear to hold that, in addition to the undisputed obligations created by treaties on the immediately contracting parties, while these treaties continue to be in force, some more general law may be extracted from them, binding upon third parties, or other nations. Thus, in section 3, Klüber remarks, "*Il importe, souvent, d'observer, tantôt l'identité, tantôt l'analogie, des principes dont elles (les nations de l'Europe) sont parties, dans les stipulations de leurs traités,*"—which passage, though rather ambiguously expressed, seems to imply, "It is often of importance to observe, sometimes the identity, sometimes the analogy, of the principles from which the nations of

Europe have set out or departed, or upon which they have proceeded, or by which they have been guided, in the stipulations of their treaties." And, at greater length, Martens had previously remarked, "that there may be formed by abstraction a theory of what is most generally practised among the states of Europe, by considering that, in many points, the numerous particular treaties of those powers resemble each other so much in the essentials that there may be extracted from them principles as received among all who have made treaties upon these subjects ; and that even treaties, though obligatory upon the contracting parties only, serve often as a model for the treaties of the same kind to be concluded with the other powers ; whence there results an ordinary mode of contracting, usually observed in practice." That Martens really meant to maintain that, from the numerous similar treaties which the European nations have concluded with each other, there may be extracted principles, and a theory formed, by which the obligatory force of treaties may be extended beyond the contracting parties, and a permanent rule of international law thereby created, binding on nations generally, and in perpetuity, can scarcely be supposed. At the same time, the language employed by him, and apparently confirmed by Klüber, though in less explicit terms, seems to bear this import, and ought to be guarded against. And it may, therefore, be proper to investigate more minutely how other jurists, prior and subsequent, and of equal authority, have viewed the matter, and whether, in the nature of a treaty or contract, there be any ground, consistently with correct legal principle and accurate logical deduction, for rearing up any such theory.

Against the danger of ascribing such extensive and indefinite effects to treaties, Dr Zouch, in the seventeenth century, and Van Bynkershoeck, in the eighteenth century, both warned international jurists. "Rectè observat Zouccheius," says Bynkershoeck, "non satis constat, an, quod illi pacta sunt, sit habendum pro jure publico, an pro exceptione, quâ a jure publico diversi abeunt. In variis pactis, et antiquioribus et recentioribus, id aded est incertum, ut ex solis pactis, non consultâ ratione, de jure gentium pronunciare, periculosum sit." \*

We may next refer to Leibnitz, Rachel, and the Prussian Privy Councillor Schmalz, the contemporary of Martens and Klüber, and perhaps more a philosopher and statesman than either.† "Samuel Rachel, the follower of Grotius and opponent of Pufendorff," (observes Professor Schmalz,) "carefully distinguished the treaties of individual nations, in particular, from the general common law of nations, which rests solely upon custom." "Leibnitz pronounced the definite idea of a consuetudinary law of nations to be equally important to the learned and to statesmen." "Leibnitz himself first commenced the collection of the treaties of states with each other, with a view to the formation and advancement of the science of international law; not as if these treaties were to furnish, through their own contents merely, the substance or whole body of the science, but because there is to be found in them pre-eminently what principles the European powers have recognised as right and just, or what they have propounded or held as recognised and unquestionable." "It must be obvious, however, that no

\* "Quæst. Jur. Publici," Lib. I. cap. xv., pp. 110, 111.

† "Europäische Völkerrecht," Buch i. S. 10, § 26-28.

common or general law of nations can be formed out of the particular treaties or conventions of single nations, however similar they may be." "Those treaties can be used for the construction of the science, only in order to ascertain what has been propounded or recognised in them as their principle or basis. And that recognised principle or basis is nothing else than custom or usage. Custom or usage, then, or what may be inferred or deduced as a consequence from a custom, for cases similar to it, are the sole science of international law."

With the German jurists last mentioned, several Danish and French distinguished jurists of the last and present century quite agree, in taking the same view of the matter under consideration.

Thus Hübner,\*—"The particular nature of the conventional law of nations cannot be contested. This secondary code of sovereign states is a particular code; because, by the confession of all the world, its maxims oblige, and can oblige only, the contracting parties, in so far as they are founded only upon treaties, and unless they are merely simple repetitions of the laws of humanity. It is evident that there are many sovereign nations who have never formed conventions with each other, and that there exists no treaty which is common to them all. Thus, since the engagements of some nations cannot serve as obligatory rules of conduct for others, it is incontestable that the conventional law of nations is a particular law of nations. From what has been said, it is easily perceived how much the conventional law differs from that which is primitive and uni-

\* Vol. II. Part i., chap. i., pp. 136, 137.

versal, with respect to their extent as well as their duration. The former has properly for its object only the actions, which are naturally indifferent ; and it binds only the nations who have undertaken some engagement with each other. The latter, on the contrary, regards all the sovereign nations of the world, known or unknown. The former is locked up, or confined, within the limits of negotiation ; the latter extends as far as the conception of civil society. Besides, the treaties which compose the conventional law of nations are obligatory only until they be infringed, or transgressed, or declared null by the contracting parties ; whereas the oracles of the universal law of nations are always in vigour : whether they be neglected or not, they are not on that account the less obligatory ; and their authority will never cease to have its full and entire effect until men shall cease to live in society."

Rayneval, also, as we formerly said, thus expresses himself : " I cannot cease to repeat, that treaties (their contents are of no consequence) do not constitute the law of nations ; they are the expression of the *particular* will of the contracting parties ; they have the same nature as contracts between or among individuals ; but in the absence of contract, it is the common law which decides ; and between or among nations the common law is the law of nations, or Droit des Gens."\*

And so little does one of the latest and most able Continental international jurists, Prof. Heffter, appear to consider treaties as possessing or creating a power to bind third parties, that he thus states the general doctrine : " To third parties a treaty can, of itself, cause no benefit

\* " De la Liberté des Mers," tom. i. § 2. p. 285.—Ann. 1811.



or advantage, no detriment or disadvantage. At the same time, in so far as the last might be the case, mediately or immediately, and in an unlawful way, these third parties may adopt measures of precaution and preservation, and previously guard against it by protests. They cannot, however, on their own account, or for their own behoof, (an und für sich,) impugn the validity, or obstruct or prevent the completion and execution, of a lawful treaty among the parties interested." \*

Finally, to these authorities of the first order we may add that of the late accomplished Mr Plumer Ward, who, beside his high talents and great acquirements in general literature and science, distinguished himself in this department of law, not only by his *History of the Law of Nations prior to the Age of Grotius*, but also by the various treatises on the leading doctrines of maritime international law, which he published about the commencement of the present century. Although he had not the pleasure of being personally acquainted with Mr Plumer Ward, the author corresponded with him; and having requested him candidly to say whether he considered the view taken of the nature and extent of the conventional law of nations in the recent work entitled *Researches, Historical and Critical, in Maritime International Law*, as erroneous or not, received the following answer :—" May 5, 1845. I have seldom read reasoning so powerful, and, in answer to your inquiry, can safely assure you, that I entirely agree with you in every word you have said against the, to me, most inconclusive attempt of the modern jurists you have

\* "Europäische Völkerrecht der Gegenwart," § 94. p. 167.

refuted, to set up a conventional law of nations upon, at the very best, most sandy foundations."

Such being the views taken, and the notion entertained, of the conventional law of nations by the most talented international jurists, both prior to and after the appearance of the work of Martens, we were disposed to conclude we had mistaken the meaning of Martens and Klüber, had we not observed that the doctrine which we hesitated to ascribe to them was adopted, and more ingeniously supported, by the able American lawyer Dr Wheaton, and very recently by M. Th. Ortolan, and consequently by the able French lawyers, of whose aid and instructions, he candidly states, he availed himself. The last-mentioned author, however, while he maintains the doctrine which we have here ascribed to Martens and Klüber, maintains, at the same time, that these writers "have never pretended that the stipulations of a treaty ought to form the rule, beyond the terms and duration of that treaty, and between or among parties, different from those who have consented to them. They all, on the contrary, (he says,) have proclaimed this principle of reason, that a treaty is not obligatory but upon the contracting parties solely ; and that, consequently, the law resulting from one or more isolated treaties is *not* a *universal* law, but a *particular* law."\* M. Ortolan, indeed, could not well do otherwise than maintain, in his second volume, that it was a mistake to suppose these two German jurists held such a doctrine as that here imputed to them. For, in his first volume, in the chapter in which he discusses treaties, he had laid down the following unexcep-

\* "Règles Internationales," 1845, vol. ii. p. 442.

tionable doctrine : "A convention is obligatory only between or among the contracting parties. This is one of those moral truths beyond doubt, which reason conceives, and upon which, when reduced to this simple expression, all the world are agreed. Now there exists among nations no general convention or treaty which they have all made and consented to in common ; consequently, treaties do *not* form a general law for all nations, but only a *particular law*, each solely for the powers, and *between* or *among* the powers, who have subscribed it."\*

How, in consistency with this obviously well-founded doctrine, the theory imagined by Martens and Klüber can be supported, it is not easy to see ; and, with a view to ascertain the truth, we shall examine more closely, first, whether either private contracts among individuals, or public treaties—that is, contracts among nations—are of such a nature as can become the basis of a sort of consuetudinary law, on the ground of the long-continued uniform and uninterrupted repetition of the same or similar acts, indicating and affording evidence of the existence of the consciousness and common conviction of mankind of the compulsory juridical or legally obligatory nature of the so uniformly repeated acts or customs ; secondly, whether the theory contended for, on the other side, be not at variance with the previous admissions in point of fact made on that side, or whether the doctrines maintained be not incompatible and contradictory.

First, then, public treaties, or contracts among nations, it is manifest, may be contemplated either as separate

\* "Règles Internationales," 1845, vol. i. p. 70.

acts, or as in connection with each other. Viewed as separate acts, it is admitted, on all hands, public treaties between or among nations do not, any more than contracts among private individuals, bind any other person than the contracting parties, according to the terms of the treaty, fairly and liberally interpreted, as long as the treaty endures, and does not legally expire by the lapse of the stipulated period, and is not extinguished by any subsequent events, which legally terminate its operation or effects.

When contemplated, not separately, but as connected, it is manifest the connection may, in point of time, be either simultaneous or in succession. When the connection is simultaneous, it is obvious it may be either by including more than two nations, in one or more than one treaty, as principals ; or by including two or more nations, in one or more treaties, as principals, and one or more other nations as accessories in subsequent treaties of accession. But here, too, it does not appear to be contended, that the effects of such simultaneous treaties extend beyond the contracting parties, the legal construction of the stipulations of the treaties, and their legal endurance, as fixed by express agreement, or as legally terminated by supervening events.

Treaties, however, may also be contemplated in connection, as following each other in succession ; and it seems to be on treaties viewed in this light alone that these later writers can plausibly found their argument and theory. Now, viewed in this light, treaties between nations may, no doubt, be considered as so many successive acts, or, to a certain extent, repetitions of the same or similar acts ; that is, what we call usages or customs.

And, so far as the argument of these later writers is free from mystery, or distinctly intelligible, it seems to be, that these successive treaties afford evidence against the contracting parties of the different stipulations contained in them, that many of these stipulations, if not altogether identical, are similar; and that through this similarity these stipulations succeeding each other, or repeated for a long period, become common customs or usages, binding upon all nations who have ever made or agreed to such stipulations; in the same way as uni-lateral acts, without any joint agreement, if uniformly repeated for ages, become established customs or usages, obligatory upon the nations who have for ages observed these rules of conduct towards each other, because their long-continued spontaneous and uniform repetition indicates a consciousness or conviction, in all men of ordinary intelligence, of the existence of a juridical relation, or legal right and obligation, independent of the consent of parties.

In this way of stating it, we conceive, we have given the argument of the opposite party all the plausibility of which it is susceptible—even more, perhaps, than they have yet given it themselves, in their vague and rather mysterious language.

But we by no means admit that identical or similar stipulations, in a succession of treaties, can be correctly viewed in the same light, or as identical, with a long-continued and uniform series of uni-lateral spontaneous acts for ages. In order to ascertain the truth, it becomes necessary to inquire, whether or how far there is any ground in fact, in observation and experience, for such identification or assimilation, or for ascribing to it such

important effects. And here, as our safest guide, we shall, as on former occasions, refer and appeal to the principles and practice of the internal jurisprudence of states, of the private law among individuals united in civil society under one government, exercising the combined force of the community or nation ; we mean that branch of the internal law of states, which is not statutory, flowing from the direct exercise of the legislative power, but which grows up gradually from age to age, as common consuetudinary law, originating in custom or usage, as indicating the conviction and belief of legal right among a people, and progressively cultivated and enlarged by the accumulating determinations of the judicial power of the state.

Now, in the internal private common law of states, it is not every description of act of which the repetition for a series of years renders it capable of affording a basis or foundation for a rule of common consuetudinary law. We never hear of contracts of sale, lease, or loan, however frequently repeated, becoming obligatory upon other individuals than those who entered into such contracts. In short, to render the acts of individuals, however often repeated, fit to create a rule of common law, they must have inherent in them certain essential requisites. For ascertaining these requisites, we shall, as we have just said, appeal to the internal common law generally of the civilised nations of Europe. And this we are enabled to do with comparatively less difficulty, from the aid afforded by the very learned and scientific treatises recently published by two of the latest and most eminent writers on internal private law, M. Von Savigny of Berlin, and the late Professor Puchta of Leipsic.

According, then, to the doctrine of the ablest Continental jurists, judges, and other lawyers, as we had formerly occasion to observe, in order to become the basis of a rule of consuetudinary law, the act must, in the first place, be, at least in a negative acceptation, of an innocent, not criminal nature, reasonable and not absurd, according to the intuitive perception or apprehension, and the instinctive feeling of mankind generally, of persons of common sense or ordinary intelligence. Secondly, the act must have been often repeated, and for a long space of time, or there must have been a long series of identical or similar acts. Thirdly, the repeated acts or practices must have been uniform, without interruption by acts of an opposite or different nature. Fourthly, judicial decisions are peculiarly fitted for ascertaining the rules of common consuetudinary law. Fifthly, the act must have been performed intentionally,—not from a feeling merely of religious, or moral, or ethical duty, such as benevolence, fair and candid estimation of others, beneficence, gratitude, charity,—not as a matter of option, to do or not to do, or as a matter of free choice, such as entering into a contract or treaty, or not ; but from the consciousness or conviction and internal feeling of a juridical or legal necessity—*Juris necessitatis opinio*. Lastly, if publicity or notoriety be not indispensable, the acts should be not secret, but of an open and palpable nature, so as to admit of being easily ascertained.

Such are the conditions confessedly requisite for the establishment of rules of private consuetudinary law among individuals living together in society, under one government ; and why the same conditions should not be requisite for the establishment of rules of customary law

among these individuals, when viewed as united into communities, and existing as separate states, it is not easy to see. But, upon investigating the collections which have been made of treaties concluded among the different European nations for the last three or four centuries, it will be found very difficult, if not impracticable, to point out any series of similar treaties long-continued and uniform, uninterrupted by treaties of a different nature, such as to form the basis of any general obligatory rules of law, binding upon any other nations than the contracting parties, to the extent of the terms and the duration of these treaties; besides the absence in all treaties from their very nature, as acts of free will or optional, of the legal requisite of having been entered into from a conviction or belief of the juridical or legal necessity of doing so.

But, it may be argued, although the treaties are dissimilar as wholes, and do not possess the requisites necessary to found a rule of common consuetudinary law, certain stipulations in these treaties are similar, have been often repeated, and recognise certain rules, which may be considered separately, and called principles. And so far as such rules arise from common juridical or legal relations, and exist in the manner before described, independently of all consent, negotiation, or treaty, we admit those principles. But so far as the rules contended for do not arise from the existence or concurrence of such physical, material, and mental relations, and concomitant or consequent juridical or legal relations, but depend upon consent for their existence, there does not appear to have been produced any such long-continued uniform and uninterrupted a series even of



stipulations in treaties, as would found such a private consuetudinary law as would be binding on individuals. And as little can such stipulations be held to bind states, beyond the contents, limits, and duration of the treaties, of which they form a part.

Supposing, however, the existence of such a long-continued uniform and uninterrupted series of particular similar, though not identical, stipulations in treaties to have been established, the question we are now considering appears to have been profoundly examined, and in a great measure solved, by the late acute Professor Puchta in his excellent Treatise on Consuetudinary Law, where he inquires, whether contracts or treaties (*Verträge*) can be adduced as proof or evidence for or of the existence of customary law or right.\* “With regard to the matters or arrangements which occur in or are fixed by the contract or treaty itself,” he acutely observes, “there are two possible alternatives:—First, it may have been precisely because some point or rule was found not valid or effectual according to existing law, that it was therefore settled and established through joint consent or agreement. And, in this case, the meaning or import of the contract, instead of affording evidence of the previous existence of the rule of law established by it, rather proves its non-existence. But, secondly, it may have been thought that what is well enough understood of itself, should, for greater certainty or security, be expressed in the contract, so that thus, conversely, it was so agreed, exactly for the reason, because it is consistent with and conformable to the common legal convic-

\* “*Gewohnheitsrecht*,” Buch iii., Kap. 11, § 4—Zweiter Theil, p. 33, &c.

tion of mankind, &c., &c. When contracts are propounded, in which the particular stipulation or arrangement is expressly made, it is so far certain that they are not absolutely to be considered as the observance of that rule of law, since the arrangement has the form of an agreement, which, in its form, at least, contains not the presupposition or announcement of an existing rule of law or command. But, on the other hand, this is not altogether decisive, since scarcely ever is a contract concluded in which the contracting parties confine themselves to that which needs or requires a special settlement."

"This question, then, will always be possible, whether the arrangement in the contract is the subject-matter of the agreement, or whether it has its foundation in the conviction of a pre-existing juridical or legal precept or command. The last may be urged and adduced, along with concurring circumstances, for evidence ; and under this requisite, contracts may be in so far used as evidence for the existence of the rule of law. In particular, the expressions used by the contracting parties may point or direct to those sources whereby they, in a certain measure, justify their arrangements."

Such appears to be the doctrine laid down by the latest and ablest Continental lawyers, with regard to the juridical or legal effect of contracts between private individuals living in civil society, as affording or not affording evidence of a rule of the internal common consuetudinary law of states, as administered to the individuals of whom they are composed. And no valid reason appears to have been assigned why the same doctrine should not be held applicable to the same indi-

viduals, when viewed in their collective capacity, as constituting a people or state. The result of this application is, that where or when a line or mode of conduct does not appear to have been previously followed and spontaneously observed by nations towards each other, a convention or treaty agreeing to such a line or mode of conduct for the future, affords evidence of the non-existence of such a mode or rule of conduct as part of the common consuetudinary law ; but that, as a line or mode of conduct which may have been well enough understood before, and occasionally followed, may be rendered more distinct, certain, and secure by the parties agreeing to it in express terms in a treaty, the latter may in this way afford a degree of proof that such right and correlative obligations were previously intuitively perceived or apprehended, or instinctively felt, and that the treaty merely rendered them more precise, and confirmed them. While, however, the alternative just alluded to remains doubtful, it does not appear how the frequent repetition of such treaties, or of the similar stipulations contained in them, can create any legal obligation on other nations beyond the parties so making or agreeing to such stipulations, or beyond the terms or endurance of the contract.

Such treaties may, for a time, recognise and confirm a rule of the common law, but they cannot create it beyond their own endurance, so as to be legally binding beyond the contracting parties. In cases where the common consuetudinary law merely establishes the general right and corresponding obligation, which, for their practical enforcement, require specification with regard to locality or time, or external material descrip-

tion, conventions or treaties are, as already remarked, of great utility — such as fixing the time for allowing foreigners to depart in the event of a rupture ; fixing the time when peace is to take effect in different quarters of the globe ; describing what articles are to be considered warlike stores, where the general or common law merely determines that the act of carrying warlike stores for the supply of a belligerent nation is a departure from the strict impartiality implied in neutrality, and warrants confiscation. But in such cases, where the specification rests solely on the treaty, such specification cannot be held obligatory on other nations, who have not consented to the contract.

#### SECTION IV.

##### *Limits of the Conventional Law of Nations.*

Having thus found that the theory proposed, though perhaps not originally suggested or steadily persevered in by Martens, cannot even be supported on the plausible ground of its being a sort of consuetudinary law founded on a series of similar stipulations, in a succession of treaties, we proceed, in the second place, to inquire whether the argument\* of still later international jurists, in support of that theory, be not inconsistent with previously recognised legal principle, and a deduction which does not logically follow from the premises in point of fact. And of these still later writers on international law, as

\* See "Précis," tom. ii. § 344.

far as we know, there are chiefly two—Dr Wheaton, the eminent North American lawyer, and M. Théodore Ortolan, who, besides his own, narrates the opinions of eminent French lawyers.

With regard to the former, while we have long entertained profound respect for this highly distinguished American international jurist,—while we have admired his extensive erudition, his acute discrimination, his generally lucid arrangement, and his enlarged views as a lawyer and a historian,—we have not always found him free from, or superior to, those perhaps natural, and at all events usual, patriotic biases, to which we are all (frequently insensibly) so liable ; and, in particular, have all along deemed his theory or doctrine respecting the conventional law of nations exceptionable, inasmuch as he appears to us to exaggerate greatly the juridical or legal operation and effect of treaties. He appears to us to consider these treaties as constituting, and proving not merely a considerable part, but, if not the whole, the chief part of international law ; while we consider them, although highly useful on various occasions, as merely supplementary of the common consuetudinary law of nations, and as presupposing in most cases, and proceeding upon the recognised pre-existence of that common law. We have just seen that public treaties, or contracts between nations and their governments, are not acts of such a nature as that they of themselves, or the stipulations and provisions contained in them, although if not identical at least similar, and although frequently inserted and repeated through a series or succession of such treaties, can become or afford a basis for a sort of customary law ; since such treaties are merely matters

of free will, of choice or option, and do not possess the ordinary and recognised requisites for constituting a solid or sure foundation for such a structure, beyond their actual and true contents, as liberally, but legitimately, interpreted.

But, further—what do treaties between nations really prove? They certainly prove that at such a time certain stipulations were made, and certain engagements were undertaken, by two or more nations, for a definite or indefinite time. But they afford no proof of such engagements having been fulfilled or performed. For the sake of argument, however, we shall suppose that the treaties do afford evidence of the actual fulfilment and performance of their engagements, as well as of their having been contracted. Still, nevertheless, the undertaking and performance of these engagements are merely proceedings or transactions between the contracting parties solely, and with reference only to their own concerns. They may alter or modify the pre-existing law, or pre-existing usage or rule of practice, so far as regards the two nations in relation to each other; but they do not prove any alteration or modification of the previous practice, as between either of the contracting parties and other nations. This negative position, it is plain, is established by the absence or want of any proof to the contrary, either in the treaties themselves, or in other contemporary or subsequent historical state documents. And upon investigation the negative will generally be found established, by positive proof, of the continuation by the contracting parties of their previous practice, or adoption by them of a different practice, with reference to other nations. With regard to the more early com-

mercial, usually called the more early civilised, nations of Europe—as Spain, France, Holland, and the independent free Hanse Towns—it may be incidentally mentioned, this positive proof may be found in the well-known work of the Chevalier d'Abbrèu, and the documents therein referred to, in the *Code des Prises*, containing ordonnances, édits, and réglemens of the French monarchs, from Francis I., in 1543, to Louis XVI., in the works of Valin and Pothier, and in the treaties of Louis XIV. with the Hanse Towns. All, then, that is really proved by treaties is a modification of the previous practice between the contracting parties themselves. Their practice in relation to other nations still remained as it was. With respect, again, to the duration of this altered or new limited practice, introduced by treaties, which on the other side is represented as being, if not in perpetuity or “for ever,” (like the formal but useless stipulation very frequently inserted in treaties, of “*peace and amity for ever*,”) at least permanent, this alleged permanency of the modified practice established by treaty must of course be limited by the duration of the treaty and by its termination, not merely by the lapse of the stipulated period, when the period is specified, but also through the occurrence of other events, by which it is admitted on all hands treaties are legally extinguished, including the intervention of actual warfare or a complete state of hostilities. For notwithstanding the milder practice of more recent international common law, by which the private contracts of individuals, suspended during the war, are held, as far as practicable, to revive on the return of peace, public treaties which regard the future conduct of nations, although they continue valid during

the first ensuing war, if framed specially with a view to the period of war, expire nevertheless and are extinguished at the end of the war by force of the intervening hostilities, unless revived by a special renewal in the treaty of peace. So far, therefore, as durability or permanency and stability are of importance, the international law constituted or proved by treaties does not appear to be of the satisfactory nature held out on the other side.

Further, in determining to what extent the law of nations has been changed by conventions or otherwise, we can by no means approve of the vague and loose mode of interpretation recommended by Dr Wheaton, in the first edition of his History, § 13, p. 65—viz., “That in order to decide whether the stipulations in a treaty ought to be considered as an application of the pre-existing law of nations, or solely as forming a special exception, in releasing them from the primitive rigour of the customary law between the contracting parties, recourse or reference ought not to be had solely to a *literal* interpretation of the text itself; and that there ought to be taken into view all the extrinsic circumstances which can be supposed to have determined the consent of parties.” Now, we have already stated that, as *bonæ fidei contractus*, public treaties ought to receive a fair and liberal, not merely a strictly literal, construction. But to admit as grounds for decision all the extrinsic circumstances which may possibly have determined the consent of parties, appears to us to be a complete departure from, or rather a subversion of, those sound and salutary rules of interpretation which have been long recognised and established in almost all the different courts of law in Christendom.



As little do we think there is any valid ground for holding that a treaty agreed to by two governments, introducing a rule of future conduct different from the previous practice, and probably considered and felt by the one party as a sacrifice or concession in respect of existing difficulties, or in contemplation of certain advantageous counter stipulations, is to be viewed not merely as a bargain between two contracting powers, which it manifestly is, as appears from the subsequent conduct of the parties in relation to other nations, but as a general declaration of a rule of the common law of nations in favour of all and sundry independent states, and of which any third nation, although not a party to the treaty, may avail itself and take advantage.\*

But every author is entitled to be judged of by the latest editions of his works, as containing his more matured opinions. And in the later edition of his History, which is stated to have been revised and enlarged, and which was more recently published at Leipsic, it is possible he may have obviated the objections which have occurred to us. Of this second edition of his History we were not aware till we lately got from Leipsic the edition published there last year, in French, of Dr Wheaton's general systematic work, entitled *Elements of International Law*, which first appeared in English in 1836. And in this revised edition of the systematic work we observe only two passages applicable to the question we are considering: the first passage in vol. i. p. 25, where the author contemplates public treaties of peace, of alliance, and of commerce, as one of the

\* "Histoire des Progrès du Droit des Gens en Europe," § 9. pp. 320, 321.

sources of international law ; and the other passage, vol. i. p. 235, where the author considers the natural cessation of the effects of treaties of friendship and alliance, of commerce and of navigation, in certain cases.

In the latter passage, Dr Wheaton seems to concur with Vattel, Martens, Pinheiro Ferreira, and of Heffter, that, while private contracts among individuals, according to the more modern milder administration of international law, are held to be merely suspended during war, and so far as practicable to revive on the return of peace, public contracts or treaties, which regulate the future conduct of nations towards each other, although they of course remain valid during war, if framed specially with reference to the state of war, yet expire or become extinct through the intervention of hostilities, if not revived or restored to validity by an express renewal as formal, or at least as regular, as the previous treaty.

In the former passage Dr Wheaton observes, "Treaties may be considered under several points of view according to the nature of the questions of the law of nations, which are resolved by these treaties : we may consider them as repeating or affirming the law of nations generally recognised ; or else as forming exceptions to that law, and as particular laws between the contracting parties ; or finally as explanatory of the principles of that law on points of which the meaning is obscure or indefinite. In this last case, treaties have, at first, the force of law between the contracting parties ; and afterwards (*ensuite*) they confirm the international law already existing, according as the explanation is more or less precise, or the *number* of the *contracting powers* is *more* or *less* important. Finally, treaties may

be considered as forming the voluntary or positive law of nations. A constant succession of treaties upon one and the same matter may be considered as expressing the opinion of nations upon that matter."

Now this exposition appears at first sight to be very simple ; it is certainly very ingeniously and skilfully framed for the support of a particular argument and doctrine, which may be very convenient for certain nations particularly situated, or placed at a time in particular circumstances. But, when thoroughly investigated, the doctrine involved in the exposition will be found inconsistent with substantial justice and with admitted legal principle. The author has not favoured us with any specimens of the different treaties enumerated and distinguished by him ; and we are not aware the distinctions made are altogether well founded on fact.

Of treaties which merely repeat or confirm the rules of the law of nations as generally recognised prior to their date, without any alteration or modification of that law, we believe, after a cursory survey, there are but few. So far as they do actually exist, they appear to have occurred chiefly in early or rude times, when the miserable practice of private warfare was prevalent, especially at sea ; when sovereigns entered into treaties to protect the subjects of the opposite contracting party from spoliation by their own respective subjects. Indeed, where the rights and obligations are simple and obvious, are intuitively perceived or apprehended, and almost instinctively felt, by all the population of states of ordinary intelligence, there could be little occasion for treaties merely to repeat or confirm such rights and obligations,

especially if recognised by a constant, uniform, and uninterrupted repetition of the same act for a long period ; that is, by a habit or custom indicating the existence among the population of different countries of the *juris necessitatis opinio*. And, usually, the only treaties entered into were for the purpose of obtaining some favour or indulgence, some real or supposed advantage, by some alteration or modification of the pre-existing law as recognised in long-established usage. Such treaties were obviously exceptions from the law of nations generally recognised, and, as seems to be admitted by the author, were merely particular stipulations or arrangements between, and binding only, the contracting parties. The third class of treaties, according to our author, were explanatory of the principles of the law of nations generally recognised, upon points of which the sense or meaning is obscure or indefinite ; and these last treaties, our author admits, had, or have, at first the force of law only between the contracting parties. But he proceeds to state, that afterwards (*ensuite*) the last-mentioned treaties confirm the international law already existing, according as the explanation is more or less precise, or the number of contracting powers more or less important. And he adds that, finally, treaties may be considered as forming the voluntary or positive law of nations." Now the correctness of this doctrine we cannot admit. In a loose sense, most treaties may be said to confirm the pre-existing common consuetudinary law, so far as they usually assume and proceed upon the presupposition of the existence of such common law. And such supplementary treaties are frequently very useful in practice, in specifying times and portions of space, and in the

minute description of external material objects ; as in specifying the period allowed to the respective subjects of the contracting powers to retire with their effects, upon a rupture ; in specifying the time when the war is to be held as having ceased, in different quarters of the globe ; and in describing minutely the articles which are to be held contraband of war, under the general rule of the common consuetudinary law, that, while neutral nations are entitled, in their own countries, to sell warlike stores, as well as other commodities, to other neutrals or to belligerents, the carriage of such warlike stores to any one of the belligerents is a breach of the impartiality involved in the legal duty of neutrality. But why such treaties between or among particular nations should, in reason, be held necessary to confirm, or how they should enforce or actually effect the observance of the confessedly pre-existing and previously recognised common law of nations, it is not easy to see. What was added by the particular treaty between the contracting states behaved to rest on the treaty, (from the consent involved in which all its authority was derived,) and behaved also to correspond in duration with the treaty, and be subject to the influence and operation of the supervening events, to the effects of which the treaty may be legally liable. The provision of the explanation, specification, or limitation contained in the particular treaty, between the two or three contracting parties, although perhaps an improvement on the general law as it previously stood as between these parties, cannot extend the obligatory force of the treaty beyond the parties who consented to it, unless the explanation or specification or limitation has been adopted by other nations, and has been followed

by such long, uniform, and uninterrupted observance and practice as to constitute it part of the common consuetudinary law.

As little can we admit the influence or effect upon the question of the number of the contracting powers, as greater or less ; for this would be to admit that nations stand precisely in the same relation in all respects to each other as individuals do who have entered into or are born in civil society, and are subject to the united control and force of the community, as concentrated in and exercised by the state or government. It would be to admit, that a majority of nations may, by their separate contracts, control and exercise a legislative or judicial authority over the minority, contrary to the universally recognised, essential, and fundamental principle of the law of nations,—their independence of each other.

Nor can we admit that treaties among particular nations can be correctly considered as forming the sole voluntary or positive law of nations ; for unless such treaties embrace not merely a majority, but the whole nations existing on this globe, or contemplated as within the sphere of civilisation, they cannot be said to proceed on the will of the dissenting or non-consenting minority. And international law, denominated positive, which means nothing more than established, recognised, and acted upon, may be, and perhaps can only be, constituted by the long, uniform, uninterrupted practice of the same or similar rules, flowing from one or other of the first two sources, which we endeavoured to illustrate at the outset.

Our author adds, " A constant succession of treaties upon one and the same matter, may be considered as

expressing the opinion of nations on that matter." And although it seems scarcely necessary to support a proposition so little liable to exception by authority, he quotes Bynkershoek (*Quæst. Jur. Pub.*, cap. x.) : "Usus intelligitur, ex perpetuâ quodammodo paciscendi edicendique consuetudine." But Bynkershoek adds, "Dixi, ex perpetuâ quodammodo consuetudine ; quia unum forte alterumve pactum, quod a consuetudine recedit, jus gentium non mutat." And even with this qualification, Bynkershoek's language is rather loose and inaccurate in the use of the terms "paciscendi, edicendique consuetudine ;" for there can be no doubt that a paction or treaty between two nations, though it does not change the common law of nations generally, may effectually change that law *pro tempore*, as between the contracting parties. And it is equally plain, the "consuetudo edicendi," adopted or followed by one nation, cannot establish or alter the common law of nations generally, although "perpetua," except as entitling other nations, upon the principle of reciprocity, to avail themselves of the rules of that edict or ordinance, against the nation which has proclaimed them. To constitute or establish a rule of the common law of nations, the edicts, or statutes or ordinances, must have been established or enacted, or, if issued by a number of nations in common, must have been, if not identical, at least similar in their nature, and must have been observed in common, in a long-continued, uniform, and uninterrupted practice—particular treaties making only a partial and temporary exception. But even supposing that Bynkershoek here really meant to say that a "paciscendi consuetudo perpetua" might change, and of course constitute the common law of

nations generally, (which we do not consider to be the fair or sound construction of the language he uses,) we have just seen that two recent eminent jurists, Savigny and Puchta, equal to him in talents and erudition, and possessing the additional knowledge accumulated during the last and the present century, consider contracts, or pactions, or treaties (verträge) as not affording of themselves a valid proof of the existence of a common consuetudinary law, but as usually and generally rather implying or affording ground for inferring the want or non-existence of such a common habitual obligatory law or common conviction of legal relation. And although a constant succession of treaties in the same matter, among a majority of nations, may certainly be considered as expressing the opinion of that majority at the time, it does not juridically or legally warrant or authorise that *pro tempore* majority to form or obtrude that opinion upon the minority at that time, especially if that opinion shall involve a change of the pre-existing common consuetudinary law, such as to promote the interests of the *pro tempore* majority, and to deprive the *pro tempore* minority of their rights, as recognised by the pre-existing common consuetudinary law and practice.

The only other recent writer on international law, who approves of the theory suggested by Martens, is, so far as we know, as formerly noticed, M. Théodore Ortolan. But the reasoning with which he supports this theory does not appear to us to be consistent with itself, or logically correct. For after stating that the authors alluded to—viz., Martens and Klüber—"have all proclaimed, as a principle of reason," that a treaty is obligatory only upon the contracting parties solely, and that



consequently the law resulting from "several (*plusieurs*) isolated treaties, is not a universal law, but a particular law," he goes on to observe, "these authors have considered, successively and separately, the conventions concluded at different epochs, by each of the civilised powers with the others ; they have ascertained, that in these public instruments, having for their end to regulate interests particular and in detail, but also to fix the grand principles of general interest, some of those principles were always, or most frequently, recognised by common consent ; that if, in times of war or misunderstanding, an abandonment of those principles had sometimes taken place, nations, instructed by experience of the disastrous consequences of that abandonment, had of new proclaimed the same principles in their treaties of peace, and had stipulated the constant observance of them in future. From that time (*on a été fondé*) people became entitled, or warranted, to deduce from that almost general conformity of decisions a theory of what is practised, or ought to be practised, among civilised nations in virtue of written stipulations ; and that is what has been called the law of nations, conventional, or of treaties."

Now we are not quite convinced that this very ingenious and plausible narrative is historically quite correct, so far as regards civilised nations entering into treaties for the purpose of fixing in perpetuity the grand principles of general interest, or that they had the legal power to do so, unless they all concurred ; or that they could legally bind other nations, not parties to the contracts founded on, to observe those principles, especially after the treaties themselves had terminated, and ceased to be legally available even against the contracting

parties. And to concede to learned jurists, however high their talents, the power of thus deducing the grand principles of the general interests of nations from the stipulations and engagements in particular treaties, would be, we suspect, to confer upon them a greater authority than any of them, from Grotius to Vattel, ever supposed they possessed.

Further, by what operation or process this, confessedly at *first* a mere *particular* conventional law constituted by separate successive treaties, has become or been converted into a *general* conventional law of nations, through a combination or comparison of the similar stipulations and engagements in these treaties, is not distinctly explained. But that the author, while he deliberately admits that the conventional law of nations founded on similar stipulations in successive treaties is particular, and binding only on the contracting parties, rather inconsistently maintains that such conventional law may by some operation be actually converted into a general conventional law of nations, binding upon all states, whether parties to these treaties or not, is manifest from the immediately succeeding paragraph, in which he assumes the existence of a *general conventional* law of nations, and talks of "the conventions, of which the stipulations depart from that *general conventional* law," and "which form, among the parties solely, a particular conventional law." And the mode in which this conversion of particular and limited obligation into general and unlimited is alleged or pretended to be effected, may be inferred from the quotation, which the author makes in terms of approbation, in that paragraph from the earlier anonymous work entitled *La Liberté de Navigation et de Commerce*, published in

1780, and ascribed by Kamptz to Professor Cobald Totze, of Bützou.\* "But" (says Professor Totze, as thus quoted) "there are treaties in which very different principles are adopted in the same affair. If, then, these principles are completely opposite to each other, the law of nations becomes dubious and uncertain. Nevertheless, as in the common occurrences of life and of affairs, we consider what is done most frequently and usually as the rule, and what happens only rarely and against the ordinary practice as the exception, a principle which is established on the greatest number of treaties ought to be regarded as the rule; and that which is found in the smallest number of conventions as the exception. It is, then, according to the principle contained in the greatest number of treaties that the dispute ought to be decided; and especially if the greatest number of these treaties are of a more recent date, and the smallest number of the most ancient. For from this circumstance it may also be inferred, that nations have gradually abandoned an old principle in order to adopt a new one; and that by that change of principles they have likewise changed the law of nations."

Now this quotation gives a tolerably distinct explanation of the mode in which the particular conventional

\* For a short account of this author and his work, see "Researches, Historical and Critical, in Maritime International Law," 1844, 1845, vol. i. pp. 326-342. He was a partisan polemical writer, equally bold as ingenious, sweeping away, as rubbish or as oppressive, the works of all previous international jurists and usages, founding international law solely upon treaties, particularly those of the seventeenth century, as constituting what he called "*Le Nouveau Droit des Gens Européens*."

law of nations—as to the existence of which there is, and can be, no dispute—is pretended to be converted into a sort of general conventional law of nations, namely, by selecting, from a number of contemporaneous or successive individual treaties, those stipulations and engagements which are similar and the most numerous, and, by combining them into a whole, or so many wholes, so as to be binding not only upon the majority, who may have *pro tempore* consented to such clauses, but upon all civilised nations. The early explanation, however, thus given by Professor Cobald Totze, was perhaps too lucid an exposition of the process of conversion ; and a little more mystery appears to have been deemed advisable by the later jurists who supported the doctrine, till this original exposition has been again recently resorted to.

For, beside the faint analogy that exists between the two different cases, which Professor Totze holds to be nearly identical, and besides the loose and illogical nature of the reasoning, these particular or individual treaties, so much founded on, it is plain, can only prove and produce a limited and temporary change of the common law of nations—namely, to the extent of the reciprocal conduct of the contracting parties towards each other, in the matters fixed by the treaty, so long as the treaty lasts ; they produce no valid change in perpetuity, or even permanently, with certainty ; they do not prove or produce any change even in the conduct of the contracting parties towards other nations ; while, in the greatest number of such cases, there exists positive proof of their previous practice being continued in relation to other nations, by documentary evidence as valid and authentic as the treaties themselves.

But further, and what is of more consequence, the principle here suggested by Professor Totze, and still sanctioned by M. Ortolan, is obviously a departure from, or rather a subversion of, the essential and fundamental rule of the law of nations—their universally admitted and immemorially recognised independence of each other. It manifestly presupposes and proceeds upon a legislative, or judicial, or executive and administrative control in the majority of civilised nations, over the minority—a power in the majority to create legal obligations binding on the minority without their consent, in direct opposition to the maxim, that nations have no superior upon earth, except the Supreme Being, and, in point of right, are subject to no control, except through the physical laws, material and moral or mental, juridical or legal and ethical, which the Omnipotent and all-wise Creator and Preserver of the universe has established.

#### SECTION V.

So much for the two grand constituent parts of international law—common consuetudinary and conventional—and for their respective natures, extent, and limits.

From our cursory observations on this subject, it is plain our view of international coercive law differs considerably from the views of various jurists ; and it may not be improper to conclude our remarks by here briefly noticing these differences.

International law, it is manifest, may be contemplated, either as existing independently of the power or acts of men, whether as individuals or as congregated into

nations or states, or as recognised, and generally and usually observed in practice, though not always by individual states and governments. Under the first view, the general appellation of international coercive, or compulsory law—that is, susceptible of physical enforcement—may be continued without any additional epithet. Under the second view, this law has been denominated, by the later Continental jurists, the positive law of nations, corresponding to what we call established, acted upon, sanctioned by practice.

Under the first view, we find, from observation and experience, the juridical relations of mankind, united in communities or independent states, as to a great extent existing independently of the power of men; as arising from the physical, material, mental, and moral arrangements established by the almighty and all-wise Creator on the surface of this globe; as arising from the co-existence and relative position and constitution or organisation and reciprocal power of action and influence of states on each other. In the continued co-existence of states, and in their general, and especially their commercial intercourse, we find also, from observation and experience, there arise various physical, material, and mental relations, and consequent juridical or legal relations, or rights and obligations, in the course of physical events, and from separate acts of nations and inhabitants of different countries, with reference to each other, but without any joint agreement or union of wills. And these individual relations, or rights and obligations susceptible of physical enforcement, we find, are to a certain extent perceived or apprehended intuitively, and felt almost instinctively, in the exercise of the faculties with which mankind are

generally endowed; and, beyond such immediate intuition, by logical deduction from obvious primary truths—in the course of their advancement in civilisation. Farther, among these juridical relations intuitively perceived or apprehended, the universal conviction of the obligation to perform engagements, (*pacta servare*,) long found so necessary and useful among individuals, is in time extended to communities or states, who by mutual consent make arrangements in treaties with each other, varying or modifying, between themselves, the modes or rules of action previously observed in practice.

To proceed to the second mode of contemplating coercive international law: when the juridical relations, or rights and obligations originally existing, or arising or occurring in the course of events, in the manner before described, come to be not only perceived or apprehended and felt, but generally acted upon, or adopted in practice, in the progress of knowledge and civilisation—and when these original, or previously adopted modes or rules of conduct may, in various instances, have been modified by special conventions or treaties—there comes to exist, as already noticed, what the later German jurists, and after them the French, have denominated the positive law of nations, corresponding to what we call the established law of nations. And there may thus be said to have been formed a code of international law, of which the rules, though occasionally and too frequently infringed by individual governments, are at least recognised and appealed to, and usually and generally observed in practice. And this code may be correctly said to consist of two parts, or branches—common consuetudinary, composed of the rules arising from the common physical and

individual relations of states, as co-existent and influencing each other by their separate acts without any joint agreement, or union of wills in contracts or treaties ; and conventional—containing such rules as may have been fixed by mutual or joint consent, and expressed, *totidem verbis*, in language.

From this brief exposition, it appears, our views approach nearer to those of Grotius—so justly styled the great father of the science—than to those of some of his less talented successors. We concur with him in the existence of a *jus gentium necessarium*, as arising from the primary and essential, and also *secundarium*, as arising from the subsequently occurring physical material and physical mental relations, and from the concomitant or consequent juridical relations of nations and states, superior to the power of mankind, to a certain extent almost intuitively perceived or apprehended, and almost instinctively felt, generally and usually recognised, appealed to and acted upon, though occasionally infringed, and especially as evidenced by long-continued, uniform, and uninterrupted custom or usage, indicating the conviction of legal rights and obligations. We concur also with Grotius in the existence of a *jus gentium inter civitates voluntarium*, so far as by these terms is meant the collection of international rules, established by public treaties, or conventions between individual nations. But beyond this division into two constituent parts—the common consuetudinary and the conventional law of nations, we do not see any necessity or ground for the other distinctions, divisions, and descriptions mentioned by Grotius ; and still less do we agree with Wolff or Vattel, in their theories of a *jus gentium voluntarium*. The



term *voluntarium* may, no doubt, be employed in opposition to *necessarium*, as being dependent on the will of mankind. But it appears to be otherwise inapplicable ; for if by it is meant the will of one nation, it is abundantly plain that no single nation has any legislative, judicial, or executive control over other independent states ; and if by it is meant the joint will of a number of independent states, agreeing upon certain regulations for their mutual intercourse, it may comprehend, but cannot be *opposed co-ordinate*ly to, such a union of wills as is formed either expressly in language, *totidem verbis*, by treaties, and therefore denominated conventional, or as is proved *rebus et factis* by implication, or legitimate inference from the long-continued and uniform acts of the states so acting in union.

Vattel, indeed, very properly rejects the *jus gentium voluntarium* of Wolff, so far as the latter founded it on the gratuitous and unproved assumption, that all nations have united themselves and coalesced into one great universal civil society, the *maxima civitas* of mankind. But he at the same time, not very consistently, retains the term *voluntarium* ; and describes three kinds of positive international law—voluntary, conventional, and consuetudinary—taking their origin from the will of nations ; the voluntary law resulting from their *presumed* consent, the conventional law from their *express* consent, and the consuetudinary law from their *tacit* consent. And we observe Dr Wheaton has, in the last edition of his *Elements*, published in 1848, apparently availed himself of the remark made in 1842 upon his apparent previous adoption\* of the erroneous division of Vattel just noticed,

\* "Inquiries in International Law," 1842, pp. 124-127.

and corrected that adoption by observing, "that, in the enumeration which Vattel makes of the different sorts of international law, there is a confusion which he might have avoided by reserving the expression of the voluntary law of nations for the genus, which he might then have divided into the conventional and the consuetudinary law of nations—the first being established by treaties, the second by the tacit consent of nations between themselves."\* But even with that correction of Dr Wheaton, converting *voluntarium* from an erroneous appellation of a subordinate species into that of a higher or more comprehensive genus, we cannot admit the term *voluntarium* as correctly designating any other description or branch of international law than what is usually termed conventional,—that is, the law to which nations, usually, if not always voluntarily, or freely, subject themselves, by undertaking or incurring obligations susceptible of physical enforcement. For we have repeatedly had occasion to show that general or common consuetudinary international law rests, not upon the mere consent or will of individual nations, but upon far higher authority and sanction, superior to human power; and that consuetude or usage is of juridical or legal value, not merely as proving the consent of individual states, but as evidence, from its long-continued uniformity, of a settled inward conviction of the legality of the rule or mode of proceeding.

As little can we concur with Vattel or Martens, or any of the other modern jurists, in founding the greater part, if not the whole, of international law on presumptions, or presumed consent or tacit consent, or, as Martens† calls

\* "Éléments du Droit International," 1748, tom. i. § 9. p. 18.

† "Précis du Droit de Gens," tom. i. § 65, p. 163.

them, tacit conventions, which are in reality legal fictions. For fictions are as little admissible, or to be tolerated, in the science of law, as in the sciences of mechanics, astronomy, or chemistry. Such fictions are, no doubt, to be met with in the internal, positive, or established laws of many nations. Indeed, one of the great defects of the Roman law, in its nomenclature, is its doctrine of *quasi* contracts and *quasi* delinquencies, where no contract had been entered into or delinquency committed, instead of classifying the actual cases or events, or combinations of circumstances, in which such juridical relations and equitable rights and obligations arise or occur, without any express intervention of consent between parties. But such fictions in the internal, positive, or established laws of nations, are truly described by M. Charles Comte\* as "suppositions destitute of truth, devised for the purpose of avoiding the application of positive laws, which are found to have become mischievous, but which cannot easily be altered by legislative authority." Farther, as a good deal of obscurity of thought and dubiety appear to have arisen from the use of such terms as express consent or express conventions, presumed consent or presumed conventions, tacit consent or tacit conventions, simple usage, and what is more than simple usage, as being complex, stronger, and more effectual, we may conclude our cursory observations by endeavouring to ascertain exactly what is really meant by these rather indefinite phrases.

The express consent, in conventions, is clear in itself, as denoting consent expressed, declared, or conveyed in

\* "Traité de la Propriété," tom. ii. p. 469.

language, oral or parole, written or printed : it may also be clearly opposed to, or at least co-ordinately distinguished from, presumed consent or tacit consent, inasmuch as the two latter are not expressed or conveyed in language ; and it forms the basis of what has been termed the conventional law of nations. But the assumed consent and tacit consent are neither directly opposed to each other, nor clearly distinguishable from each other. Presumed consent, as opposed to express consent in language, as in conventions, is a more general appellation than tacit, and is applicable to any mode of conveying or communicating or making known the consent, different from spoken or written language, as by repeated acts or conduct. Presumed consent is an assumption derived or inferred from premises previously established, whether intuitively recognised, felt, or otherwise logically deduced from such intuitions, or primary truths, or ultimate laws of our nature. The term tacit, as applied to consent, appears to be more limited than presumed, and to be applicable only to the mode of conveying the consent, as not being by language or words spoken or written, but by a silent acquiescence, significant of consent : *Qui tacet, consentire videtur*. If by tacit were meant absolute silence, the tacit conventions imagined by Martens would be an absolute and manifest contradiction and absurdity. And, even as just explained to be a silent acquiescence in a mode of expression in language, or mode of treatment otherwise, by other individuals or nations, the terms "tacit consent" form a still more vague and unstable basis for international law than "presumed consent." Neither present or afford any distinct line of demarcation. If the consent be not distinctly conveyed and

made known, of course it can be of no avail in law. If distinctly conveyed or made known, though tacitly, it is equal in legal force to consent expressed or declared in language, and to consent presumed or inferred, in any other legally valid way.

Nor does there appear to be much more correctness in thought, or propriety in language, in the division of usages into simple or not simple, or more than simple ; for the ordinary opposite to simple—namely, complex—does not appear to be here at all contemplated by the jurists who make this distinction. According to Martens, simple usages are the basis of a part or description of international law ; \* and yet the rights and obligations, which constitute this department or description of law, are what jurists have absurdly enough called imperfect, and cannot be enforced ! In other words, it is a part of or kind of international law, which wants the essential quality of all law—as coercive or compulsory justice ! Klüber, more consistently, does not regard simple usages as forming part of the positive law of nations.

Our views with regard to the nature and description of usage which operates and has effect, in contributing to lay the foundation of the common consuetudinary law of nations, we formerly explained at sufficient length ; and we may merely here add, that, besides the universality or generality, and constancy or long-continued and uninterrupted uniformity of usages, they may correctly be distinguished according to their extent, or the space and objects embraced by them. The usage may be merely local, municipal, provincial, or of a particular trade or

\* "Précis du Droit des Gens," tom. i. § 65, 66, 67, pp. 163-169. Klüber, "Droit des Gens," pp. 12, 14, 16.

business ; or the usage may be national, embracing the whole territory of a state and its people. Or it may be international, as between the inhabitants of different independent countries and their governments.

The result in point of truth is, that there are in reality not three, but only two kinds or sorts, or branches, or departments of international law. First, common and consuetudinary, founded on or arising from the co-existence and other essential physical, material, and mental, and concomitant or consequent juridical relations of independent nations or states to each other, and from the subsequent events in their intercourse, and their uni-lateral acts, affecting each other without any union of wills or joint consent, as proved and established, not by presumed or tacit consent, but by a long-continued, uniform, and uninterrupted succession or series of acts, or usages of nations, with reference to or affecting each other. Secondly, conventional international law, arising from and formed by express consent, declared in public treaties or national conventions, construed liberally as *bonæ fidei contractus*, according to the long-established rules of legal interpretation.



## **CHAPTER VI.**

**NATIONAL INTERVENTION.**





## CHAPTER VI.

### NATIONAL INTERVENTION.

IN assigning a title to this chapter, we have intentionally abstained from giving the subject of which it treats the denomination adopted by some of the latest writers on the law of nations, such as Professor Heffter of the university of Berlin, in 1844, and Dr Wheaton in the last edition of his *Elemens du Droit International*, published at Leipsic in 1848—namely, the “Right of Intervention;” for we humbly conceive no such primitive or primary absolute right of intervention exists among sovereign independent nations. And it may be worth while shortly to inquire, whether there is any ground for recognising such a right of intervention : first, in point of legal or juridical principle; secondly, in point of usage and traditional authority; thirdly, in point of general expediency.

First, then, such a pretended original or primitive and positive right of intervention will be found, upon inquiry, to be inconsistent with the fundamental principles of the law of sovereign states, as universally recognised. In general, no such right of intervention can exist with regard to those matters which it belongs to each state to arrange, in virtue of its freedom and independence—namely, the constitution and administration of its internal government. No state can legally impose upon another any particular constitution, or promote or oppose

changes therein, or exercise any legislative, executive, or judicial power, civil or criminal. As little can any state exercise over another any external sovereignty. And the principle of non-intervention is thus manifestly the *general* rule, and intervention merely the exception.

The chief primary or original, and absolute or unconditional, rights of a sovereign state, are—self-preservation and independence ; legislative, executive, and judicial powers, civil and criminal ; right of progress or advancement, and of promoting its own prosperity, consistently with the similar right of other nations, and involving equality in point of right ; right of territory and property, right of binding by treaty, right of defence by war. But the right of intervention cannot be ranked in the same order, or placed in the same class, with these rights ; it falls under the right of self-preservation and defence. It can be justified only, upon legal grounds, by such previous acts of aggression on the part of other states, or such aggrandisement of other states, through conquest or succession, as actually to endanger the safety of the neighbouring state, and to warrant what has been denominated, in modern Europe, the maintenance of the balance of power among the nations of this quarter of the globe. It does not appear that intervention can be legalised by the mere increase of the wealth or population of a country, or by its sending out a portion of its population to other parts of the globe, and forming colonies : for colonies frequently weaken, as much as strengthen, the mother country ; and, in their natural progress, colonies seem entitled and destined ultimately to detach themselves from the parent state, and to obtain self-government.

In the second place, with regard to usages or traditional authority, it is plain that mere aggressive acts can never be rendered legal by continued repetition for any period, however long. There can be no prescription of criminal acts of violence. And non-intervention being obviously, in point of principle, the general rule of international law applicable to sovereign independent states, and intervention merely the exception, it accordingly appears that the earlier modern writers on the law of nations, such as Grotius, Pufendorff, and Rachelius, have not specially or expressly recognised any such primary positive right of intervention. Vattel, indeed, the populariser and improver of Wolff, from the vague and indefinite conception which he seems to have formed of international law, in his otherwise excellent work, *Le Droit des Gens*, includes not only the internal law of states, public or constitutional, municipal and private, but also the ethics or morality of nations in relation to each other. And not distinguishing the marked difference between the negative virtue of justice, and the positive virtues of benevolence and beneficence, inasmuch as the former are susceptible of enforcement by human means, consistently with the common sense and moral feelings of all mankind, and with general or universal expediency, while the latter do not admit of any such enforcement, he seems to follow many preceding jurists, in holding the latter of these moral obligations, as well as the former, to be productive of corresponding right. And he is thus led, or in a manner reduced to the necessity, of dividing rights, like many of his predecessors, into perfect and imperfect ; the latter of which cannot be enforced, and are, therefore, no rights at all, in a legal or juridical

sense. But while Vattel holds it to be the moral or ethical duty of every nation, and its government, to promote the welfare of other nations, so far as it can, consistently with its own welfare and the promotion of its own prosperity, he does not recognise any right of intervention, by one or more nations, even for alleged beneficial purposes. And Professor Lampredi of Florence, who in 1782 published his excellent work, *Juris Gentium Theoremata*, while he expounds it as a right of nations, if they choose, to carry on commerce with each other, so that they cannot, with certain exceptions, be legally interrupted by other nations, admits that a nation cannot be legally compelled to engage in such commerce unless it chooses: *Nemo est, qui, non potenti, aut venienti et invito, pervim, obtrudem beneficium*, (vol. iii. § 3.) Even G. F. de Martens, whose treatise *Du Droit des Gens* appeared first in 1788, and the second and third editions in 1801 and 1820, does not expound any such primary absolute right of intervention. Nor did Privy Councillor Schmalz in 1817, or Klüber in 1819, particularise any positive right of intervention, as existing among the European nations, under permanent and generally binding treaties, or as founded on any long-continued usage of such treaties. That voluminous German writer, Moser, 1770-1780, that more acute German jurist, Günther, 1787, and likewise Martens, rather bring forward intervention as merely a subordinate negative right, resting on previous acts and events, under the positive and primary right of self-preservation and defence, and as embracing and warranting such measures as may be calculated to maintain an equilibrium of power among civilised nations, and prevent the aggrandisement

of one nation to such an extent as to endanger the safety of others.

On the other hand, the later distinguished international jurists, Professor Heffter and Dr Wheaton, appear, at first sight, to give to intervention a more prominent position, by devoting an article or section to the right of intervention, as if it were a primary or fundamental right, like self-preservation and independence, not resting on the right of self-defence, when the aggression has been actually made, or on the maintenance of the balance of power among states, when there arise well-founded apprehensions of aggression; but rather as resting on alliances and treaties, general, if not universal, or on a kind of common law, founded on a continued usage of such treaties. And in the last edition of his *Elemens*, published in 1848 in French, Dr Wheaton, in the second part of his work, devoted to international rights, primitive and absolute, in chapter first, on the right of conservation and independence—after section 1, on the rights of sovereign states with regard to each other, and after section 2, on the right of conservation—proceeds, in section 3, to discuss “the *right* of intervention,” apparently as falling under this description of primary rights. From this section (section 3) being marked, on the margin, as treating of the *Droit d'Intervention*, we were apprehensive that this able author intended to elevate what he called a right of intervention, from being, as admitted by previous systematic writers on the law of nations, a subordinate, conditional, and merely negative right, into a primary, absolute, and positive right, upon the assumption of some French writers that treaties entered into by the majority of civilised nations are, in particular cases,

obligatory on other nations, although not parties to these treaties; or that usage, as constituting common consuetudinary law, may be established by treaties, although afterwards reciprocally departed from, expressly, or *rebus et factis*, by a long series of acts, or reciprocal conduct, observed for ages. But we were happy to find, on proceeding to section 12, that this ingenious as well as learned author has not made any such attempt, but hitherto, at least, coincides with us in opinion, that non-intervention is the general rule, and that intervention is merely an exception, founded on absolute necessity; and that, in giving a succinct and neat account of the various successive interventions, *de facto*, which have taken place among the European nations since the peace of Westphalia in 1648, he does not found upon them as introducing a new rule in international law, or as elevating a subordinate and conditional right into a higher grade and primary position. The following paragraph is so just, and happily expressed, that we beg leave to quote it:—

“The occasions on which the right of intervention may be exercised, to prevent the aggrandisement of any state, by innocent and legitimate means, such as those we have just indicated, are rare, and cannot be justified, except in the cases in which the augmentation of the military and naval forces of a power may have been such as to inspire just fears in other powers; the interior development of the resources of a country, or the acquisition of colonies distant from Europe, have never been considered as sufficient reasons to justify an intervention. It would seem to have been generally thought that colonies, far from contributing to exercise the power of the mother country, rather contribute to weaken it. The increase of the

wealth and of the population of a country, which is, beyond doubt, one of the most efficacious means of increasing its power, takes place too insensibly to inspire other countries with just or reasonable alarm. To believe that nations have the right of intervening, by force, to prevent the development of civilisation, and to destroy the prosperity of neighbouring nations, is a supposition of which the injustice is so manifest that it needs no refutation. Intervention, to maintain the equilibrium of the powers, has usually for its object to prevent a sovereign already powerful from incorporating conquered provinces into his territory, or augmenting his dominions by marriage, or by succession, or exercising a dictatorial influence over the policy of other independent states."

After noticing the alliances formed, and the wars undertaken, to set bounds to the aggrandisement of the House of Austria and Spain, under Charles V., and his son, Philip II., which were terminated by the Peace of Westphalia, and then to the ambitious projects of Louis XIV., which forced the Protestant states of Europe to unite with the House of Austria, and to take part in the English Revolution of 1688, Dr Wheaton proceeds to enumerate, in section 4, the intervention on the occasion of the wars of the French Revolution ; in section 5, the Congress of Aix-la-Chapelle, of Troppau, and of Laybach ; and in section 6, the Congress of Verona. In section 7, omitting altogether any allusion to the intervention of France, Spain, and most of the other Continental nations in 1780, on the occasion of the dispute and war between Great Britain and her North American colonies, he goes on to notice the intervention on the occasion of the war between Spain and her American colonies. In section 8,



he mentions the intervention of Great Britain in the affairs of Portugal in 1826. In section 9, he records the intervention of the Christian powers in favour of the Greeks. In section 10, he notices the intervention of the great powers of Europe in the internal affairs of the Ottoman Empire in 1830. In section 11, he mentions the intervention of the five great powers in the revolution of Belgium in 1830. In section 12, before referred to, Dr Wheaton thus distinctly expounds the law of nations: "Each state, in its quality of a distinct moral being, independent of all other states, may exercise all its sovereign rights, provided that, in exercising them, it does not hurt or infringe the similar rights of other states. Among these rights is that of establishing, changing, and abolishing the constitution of its government. No foreign state has a right to oppose the exercise of this right, unless this intervention be authorised by some special convention, or by the necessity of preventing events which would compromise its independence and security. Non-intervention is the general rule, and the only exceptions to this rule are founded on absolute necessity."

In section 13, Dr Wheaton correctly expounds, that the approved usage of nations authorises the proposal by one state of its good offices, or mediation, for the arrangement of the internal dissensions of another state, and, *if this offer of mediation be accepted*, this act *alone* justifies the intervention.

In section 14, Dr Wheaton farther expounds the law, that the political independence of each state embraces not only the form of its government, but also the choice of its supreme magistrate, and subordinate authorities, as regulated by the fundamental laws of the state: and in section

15 he observes, the only exceptions from these general rules are those which result from treaties of alliance, of guarantee, and of mediation, to which the state whose affairs are in question is a contracting party; or treaties concluded by other states, in consequence of a supposed or inferred right of intervention, founded on the necessity of their own preservation, or upon an eventual danger threatening the general security of the powers.

Finally, in section 16, Dr Wheaton observes, the treaty of the Quadruple Alliance, concluded among Britain, France, Spain, and Portugal, affords a remarkable example of the questions relative to the succession to the crown in these two latter kingdoms.

From the preceding short review of the first chapter of the second part of the last edition of Dr Wheaton's *Elements of International Law*, in French, we are happy to find that, while we regret he, along with the Berlin Professor, Heffter, has given the unqualified appellation of rights to the more recent practice of the European nations of intermeddling with the affairs of other states, Dr Wheaton, at the same time, so explicitly admits that non-intervention is the general rule of law, and intervention merely the exception, admissible only, when it is justified, in cases of free consent, or by actual aggression, or by such aggrandisement or combination of individual states as to afford well-founded dread of danger and injury in other states, such as to warrant measures of prevention, in order to maintain the balance of power among civilised nations. And this is the more satisfactory to us, for several reasons. Dr Wheaton's *Elements* are not merely a learned, but also a very able and systematically and philosophically arranged work, composed in the

English and Continental languages by an American lawyer, consequently well acquainted with English law, and subsequently trained to diplomacy at the court of Prussia. This work is therefore likely, in future, to be held in estimation as an authority, not only in America and on the Continent of Europe, but also in England, and there to supersede the work of Vattel, which owed the celebrity it obtained in Britain very much to the praises bestowed on it in Parliament by several of the illustrious statesmen of the ages now gone by, and in consequence, perhaps mainly, of the apparent indisposition hitherto of eminent English lawyers to treat scientifically of international law. And it is therefore a satisfaction to us that, in the matter of intervention, we have no occasion to differ from so eminent an author as Dr Wheaton, as we formerly felt ourselves called upon to object to what appeared to us to be an attempt, very ingeniously, but groundlessly, to rear up for a particular purpose, in support of the armed-neutrality scheme of the Empress Catharine, a law of nations founded entirely on a number of nearly simultaneous treaties, by a majority, in hostile combination, of the European states, such as to be obligatory on other nations, who were in no respect parties to these treaties, or on the assumption of a series of successive treaties, though only by a majority of states, constituting a usage, such as to form a common consuetudinary law of nations, although these treaties had expired, or had been departed from by a series of acts or conduct quite inconsistent with any such assumption or inference.

In the third place, as it does not appear from Dr Wheaton's account of the different interventions recently

practised by the European nations, that they have been successful hitherto in establishing better principles of justice, equity, and general expediency, than what were previously recognised under the right of defence, and the maintenance of the balance of power, we may now, as proposed, proceed to inquire briefly whether such interventions are likely to be of use, or ought to be attempted, except in cases of urgent necessity, to prevent a greater social evil. And here, we conceive, we cannot do better than give the observations made in 1847, before the last French Revolution of February 1848, by a gentleman \* who is no doubt a British subject, but was then resident on the banks of the Rhine, and is a calm, impartial, and discerning observer of the passing events of the times :—

“ The recent events in Spain, Portugal, and Italy, lead one to wish that some one capable of the task would lay down clearly the law of states which ought to regulate political interventions, and application of military force, in friendly countries. Such a work, by settling public opinion, might form a check, and almost the only check, on despotic princes, and even on comparatively popular governments, ministers, and statesmen. In the unsettled state of some questions of that kind, we have to dread the collisions likely to ensue among neighbouring states, interfering each on its own principles, deeply coloured, of course, with its own supposed interests, may lead to a renewal of those great and desolating wars which have, in our times, so long kept down Europe. Now that most of the smaller states have been swallowed up by the greater, there can be no little wars, no campaigns limited to

\* William Erskine, Esq.

marching and countermarching, and the operations of which terminate in the siege or capture of a petty fortress. Even the plan of the general congress, by which the larger states settle the quarrels of the lesser, is subject to grave objections. No foreign country enters fully into the feelings of another, or is fully aware of its actual situation, or of what is best for it. What foreign state could understand, or intervene, without the greatest mischief, in the party contest of the British nation? What, for instance, if they were generously to undertake to settle Ireland, under pretence that the country has always been misgoverned by Britain, and that a new system is called for? In general, all armed intervention appears from experience to be mischievous, except for the purpose of resisting foreign intervention. Where a portion of a country had separated itself from the rest, and formed a new state, as in the case of the Low Countries or the United States of America, the case becomes different, and seems to resolve itself into that of independent nations among each other. So ill do interventions in general succeed, that it seems that no intervention at all is the best rule. Much misery may, no doubt, in this way, be permitted, and will cause, among the rival parties within the country, much bloodshed and cruel proscriptions. But it seems doubtful whether even these are not less pernicious than the ascendancy given to one party under foreign influence, the stop put to the natural improvement of the country, and the changes introduced into laws and customs; one consequence always being, that the governing power, be it what it may, is invested with sufficient power to put down all sedition, which is often extended to mean all freedom of

thought. Foreigners put armies at the command of the prince. The laws that should regulate and restrain the executive are never thought of, or are left to the tender mercy of an ignorant prince, or of an unprincipled favourite. It is doubtful whether the rigour and fermentation caused even by a civil war is not better than the hasty and forced peace produced by foreign arms, which generally suppose the prostration of all internal and national force and vigour."

In the truth and justice of these observations we were, at the time, very much inclined to acquiesce. But the leisure which the peaceful reign of Louis Philippe afforded for such inquiries and discussions was sadly interrupted by the last violent French revolution of February 1848; which not only swept away the constitutional monarchy, but in its explosion kindled the flame of intestine discord and civil war in Berlin, Vienna, and Rome, and threatened to overthrow the fundamental principles of justice upon which the social union depends. The greatly increased facility in travelling by land and sea had recently increased the means of communication and combination among the worthless and mischievous portions of the inhabitants of the different European capitals, and large mercantile and manufacturing towns. The dependent condition of a large portion of the working population of Paris caused them to be easily misled by the absurd and almost insane schemes of Parisian political speculators, equally impracticable as unjust. Highly enthusiastic popular feelings of freedom and independence had for some time prevailed throughout Germany, not merely among the worthless portion of the population, who aimed solely at their own selfish and unjust aggrandisement, but

also among a large portion of the middle class of population, who *bond fide* wished only the removal of grievances and a moderate constitutional government. The, to foreign nations, apparently excessive excitement and zeal of the Germans generally in favour of the population of the Dutchies connected with Denmark, and their consequent obstinate hostility to the Danes, threatened the integrity of that small kingdom. Finally, the old and gradually becoming weaker policy of the Austrian government, the fluctuating and inconsistent policy of the King of Prussia and his ministers, the mistaken policy of the King of Sardinia, and the degraded state generally of the Italian population, high and low—all the causes and events now and before alluded to, conjoined to spread a political intestine conflagration over the continent of Europe, from which it has not yet by any means entirely recovered. France, in 1848, presented a striking spectacle of wickedness and weakness. To put an end to the horrors of civil war and slaughter by the mob of Paris and other large towns, recourse, as usual, was had to the army for protection of life and of property, and to restore order and comparative tranquillity. But, unfortunately, in the government which came to be established, the executive and legislative powers appear to be opposed to each other in a manner inconsistent alike with steady co-operation or stability ; and unfortunately, also, although constructed upon a basis as broad as practicable, the representation has not hitherto secured a body of men, however intelligent, sufficiently patriotic to sacrifice their selfish individual or party views to the national welfare. In Austria, perhaps, the greater evil was avoided by the ultimately weak administration of Metter-

nich being succeeded by at least comparatively able and energetic men, who were enabled to put an end to the miseries and horrors of internal civil war, by the aid of the less civilised nations on the north and east. And although adverse to any foreign interference whatever, we must do the Emperor Nicolas the justice to admit that, although his alliance and aid in support of Austria, of course, gratified his ambition and increased his own power, he acted as disinterested a part as will reasonably in the circumstances be expected. The alliance of Austria and Prussia appears, also, with the support of Great Britain, to have fixed the vacillating policy of Prussia, and secured in the mean time the threatened integrity of the sunk kingdom of Denmark. And by this union of theirs, these great Continental powers, if they were only to abstain from their own aggrandisement, and promote the establishment of moderate constitutional governments, protecting the individual rights and energies of the people, might perhaps effectually contribute not only to the tranquillity, but also to the positive welfare and advancement of Germany in general. The evil, however, is, that this new combined intervention on the part of Austria, Russia, and Prussia, is by the despotic governments, whose more recent proceedings, as well as those of the minor sovereigns of Germany, indicate an intention of measures, of which the result will probably be very different from that just alluded to. But Great Britain, Holland, and Belgium, it is trusted, will continue to have, and France and Sardinia, it is to be hoped, will soon be able to construct for themselves, constitutional and truly liberal governments upon a popular basis, with free institutions, protecting individual rights and interests, and will thereby



set and exhibit a salutary example of regulated liberty to the Continental nations of the east and north of Europe; for this is almost the only intervention or influence which one nation can legitimately exercise upon or in relation to another. This influence of example is no doubt indirect; but when the national intercourse is frequent or intimate, it is powerful, and operates safely, because gradually. It is more efficient for good than even the generosity of a government which declares its territory a place of refuge and safety for all the unfortunate under political changes, such as dethroned kings and disappointed ministers. And it is never liable, like it, to the risk of a well-founded reproach; for an indiscriminate and too generous declaration by a government, that its territory is a safe refuge for all the unfortunate under political changes, may not only relieve and succour the unfortunate innocent, but also afford undue shelter to the guilty, who have been unsuccessful in enterprises, if not absolutely criminal, at least undertaken solely for their own selfish aggrandisement; and may thus afford such individuals the means of carrying on, in the midst of a foreign European capital, schemes of mischief which they had not the means of maturing in their own native countries. National pride and generosity are not sufficient, any more than superiority of wealth or power, to excuse or legally justify a neutral nation, desirous of peace, in affording the means of political machinations, which is, in fact, equivalent to an actual intervention.

**FARTHER INQUIRIES**  
**IN**  
**INTERNATIONAL LAW.**

**PART SECOND.**

**ON PRIVATE INTERNATIONAL LAW, OR THE LAW OF  
NATIONS IN THEIR INTERCOURSE IN THEIR CA-  
PACITY AS INDIVIDUALS, OR ON THE CONFLICT OF  
LAWS.**

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

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## **CHAPTER I.**

**OF THE MODE IN WHICH PRIVATE INTERNATIONAL LAW  
HAS BEEN CULTIVATED.**



## CHAPTER I.

### OF THE MODE IN WHICH PRIVATE INTERNATIONAL LAW HAS BEEN CULTIVATED.

THE term "international," now current in France and Germany, as well as England, is correctly remarked by M. Ortolan, Professeur à la Faculté de Droit de Paris, to be of British origin. And there can be no doubt it was introduced by Mr Bentham, without being aware that the same view of *Jus inter Gentes*, or of *Jus Gentium inter Civitates*, had been previously taken by Chancellor D'Aguesseau ; and, by the latter, apparently also without being aware a similar view had been previously taken, during the seventeenth century, by Dr Richard Zouch (Zoucheius) of Oxford, afterwards Judge of the High Court of Admiralty of England. To the adoption of this new "term" Mr Bentham appears to have been led, in the exercise of that acute discrimination of ideas and words for which the science of law is so much indebted to him, in order to put an end to the confusion which had arisen and long prevailed from the same term, the Law of Nations, or *Jus Gentium*, having been applied by different authors at different times, and by the same authors in different places, to denote branches or departments of law very different from each other. And while it is to be regretted Mr Bentham did not push his analysis and discriminative phraseology farther and

deeper into the details and component parts of international law, the introduction of this new term has certainly been of great use, in marking distinctly that department of law which is composed of, and unfolds, the reciprocal rights and obligations of nations or independent states towards each other in their mutual intercourse. It has put an end to the risk of its being confounded with the *Jus Gentium* of the Romans, which seems to have designated that branch of the internal law of a state which is not peculiar to it, like the *Jus Civile*, but which it enforces and observes in common with other civilised nations. And it clearly distinguishes the external juridical relations of nations in their intercourse with each other, from those branches of the internal jurisprudence of independent states, such as the law of maritime commerce, of which the rules or component parts are similar or analogous, and common to a number of civilised nations ; and which, in modern times, had come to be frequently designated and called by the vague appellation of *Jus Gentium*, although they did not involve international rights or questions between nation and nation, collectively or individually.

Besides the significations just mentioned—the one definite and precise, the other loose and indefinite—there has also come to be in practice a third signification of the *Jus Gentium*, as involving those laws, or questions, or doctrines, which arise from a *conflictus legum*, or collision of laws. But it does not appear that this department of law can correctly be denominated international, unless it involves the reciprocal rights and obligations of different nations towards each other, either in their collective or individual capacities and intercourse ; and it

rather appears the various writers who have treated separately of the conflict of laws generally, as a whole, such as Rodenburg, Voet, Hertius, and Boullenois, have not traced its ultimate principles to the international juridical relations of independent states. A conflict or collision of laws, juridically affecting the interests of individuals, does not necessarily imply that these individuals belong to different communities or states, foreign to each other. It may arise among individuals of the same nation or state, if they have changed their place of residence from one country to another, or enter into contracts or mutual transactions, or execute uni-lateral deeds in one country, which are to be carried into effect in another, where a different law prevails. Without distinguishing that the *conflictus legum* may have either of these two sources, and observing the difficulty of solving such questions agreeably to the principles of international law solely, in consistency with the fundamental principle of that law — the independent sovereignty of each nation — the older writers on the *conflictus legum*, such as those before alluded to, have unhappily sought to find principles for the solution of such questions in what they have termed the *personalité*, the *réalité*, and the mixed nature of laws in these respects. On the other hand, the later writers in this department of jurisprudence seem to have erred, inasmuch as they give the appellation of international law to a class of cases and rules which do not presuppose any question, much less any conflict or collision, between the laws of different nations, but may and do occur in one and the same nation. In the latter case, the laws or judicial determinations arising out of the *conflictus legum* are a part, not of inter-



national law, but of the municipal law, or internal jurisprudence of each sovereign independent state.

Having thus distinguished international law, properly so called, from the other departments of law, which were formerly very frequently and generally designated by the terms *jus gentium*, or law of nations, we have next to inquire how the term, "private," has recently come to be applied to international law. In the interior of civil societies, or communities, or independent states, one portion of the law determines the powers and duties of the government towards, or in relation to, the governed, or subjects generally, and is called "public," or "constitutional:" another portion determines the rights and obligations of the individual subjects, in relation to each other, not to the state or government, and is called "private." In the same way, among independent states, their intercourse may either be in their collective or public capacity, or between or among the private individuals of whom the nation is composed. When the nation acts, as in negotiations, in the conclusion of treaties, or in entering into war, it must of course do so in its national, collective, and public capacity, through its government. And when a nation is reduced to the necessity of using physical force in defence or in vindication of its just rights, the nation or government goes to war, not private individuals. But war is the extraordinary and unnatural state of nations—peace their ordinary and natural state. During the violent and compulsory state of war, undertaken for the purpose of enforcing international law, when infringed, the rights and obligations of the individuals composing the belligerent nations, in relation to each other, are annihilated or suspended. Intercourse ceases

between the inhabitants of the belligerent countries. During peace, the rights and obligations of the inhabitants of countries, living under separate and independent governments, in their mutual intercourse, are either voluntarily observed, without any compulsion, or are enforced *modo civili*, under express conventions or reciprocal declarations, or under long-established international usage, by the tribunals of one country, with reference to the subjects of another government. And this last department, it appears, may be properly enough called "private international law," as distinguished from the *jus publicum belli*, and the other public international law, which regulates the conduct of governments in negotiating by public ministers and in concluding treaties ; and as including the *conflictus legum* among individuals, so far as it arises between the inhabitants of different independent states ; reserving the other cases of the *conflictus legum* among the subjects of the same government to be determined by the internal or municipal law of each sovereign state.

It being thus apparent that there are valid grounds, both in fact and law, for the distinction of law into international, as well as national, and of international into private and public, it is strange that the series of Continental writers on the *conflictus legum* during the seventeenth and eighteenth centuries—jurists not only learned, but acute and ingenious—should have considered the doctrines of the *conflictus legum* as a separate department of law, forming a whole of itself, without regard to the different sources from which the conflict may arise, or to the different legal principles which may consequently become applicable. And it may be worth while

to inquire what may have been the causes of this rather singular mode of proceeding.

If the laws of all nations were identical, there would, of course, be no occasion for the courts of justice of one nation enforcing the law of other nations ; or, at least, in enforcing the law of other countries, the tribunals of the one country would be merely enforcing their own laws. But experience proves that the laws and usages of different nations, tribes, and states, differ in many important particulars. And the differences in these laws and customs, it is plain, arise from the physical differences in the mental and corporeal constitution of the different races of mankind ; from the mode in which the species is propagated, and the varieties in the succession of individuals, of whom, from generation to generation, the community is successively composed ; from the differences in the external circumstances, in point of climate and produce, in which these various races of men and individuals are placed, as separated and scattered, in independent communities, over the surface of this earth ; and from the different degrees of advancement they have made in the cultivation of the arts of life, and in what is called civilisation.

Farther, these differences in laws and usages appear, historically, to have been increased, for a time, in modern Europe, by the manner in which the Western Roman Empire was invaded, overrun, and finally occupied, as settlers, by the comparatively barbarous population of the northern and eastern regions. That population consisted of a great number of separate and independent tribes, forming distinct communities, having each a government of one kind or another within itself. Among these

we find the Visigoths, the Ostrogoths, the Vandals, the Huns, the Franks, the Alemanni or Germans, the Longobards, the Burgundians, the Saxons and Anglo-Saxons. And these different tribes, when they finally settled, appear to have occupied separate portions of country as their territories, and to have continued or formed distinct states or governments. Thus Spain continued for ages to be divided into, and to be occupied by, several independent kingdoms and states. France was divided into several large independent provinces on the north and on the south—the latter observing the written, the former the customary or unwritten law ; and Germany, under the nominal Roman Emperor, was divided into a number of separate kingdoms, electorates, dukedoms, and smaller states possessed of sovereign power. Even the British Isle, not to mention the Heptarchy and Wales, was divided between two separate nations and independent governments.

In the progress of time, however, from various causes—such as the marriage alliances of sovereign families, and the succession of princes to the kingdoms or territories of their deceased relatives, and the ambition of sovereigns and republics terminating in conquest—the great number of the originally small kingdoms, principalities, or provinces, came to be united into the larger kingdoms and states into which modern Europe has been divided, and is now occupied. At the same time, although a number of small kingdoms, principalities, and provinces, came thus, from the operation of such causes, to be united and combined into greater wholes, under one head and central government, the local long-established habits and usages of the populations of these different provinces did not

thereby undergo a corresponding union, amalgamation, and identification, or even assimilation, either immediately, or for a series of ages. In France, in particular, the difference between the laws, usages, and customs of the southern and of the northern provinces was great, and seems to have continued till after the Revolution, in some manner, if not even till now, as may be seen from the learned labour of Merlin and Toullier. Nay, when the inhabitants of the narrow district of Holland liberated themselves from the oppressive government of the Austrian and Spanish monarchs, there were differences in the local laws and usages of the small municipal states or provinces of which the Union came to be composed.

In these particular circumstances there arose various and more frequent collisions of laws, *conflictus* or *collisiones legum*, which early attracted the attention of the commentators on the Roman civil law, such as Bartolus and Baldus ; and afterwards exercised the ingenuity of the writers on the local usages and particular laws, not only of the larger separate independent kingdoms or states into which the European Continent came to be divided, but also of the provinces or districts which came to be united in the formation of these larger states.

Early in the fifteenth century (1529) Molinæus, or Charles du Moulin, published *Commentarii in Consuetudines Parisenses*, afterwards published in Paris at 1625, under the title, *Les Coutumes Générales et Particulières de la France et des Gaules*, with annotations, augmented by Michel in 1635. Towards the close of the sixteenth century, Argentræus (President D'Argentré) published his commentaries *Sur les Coutumes Générales du Pays et du Duché de Bretagne*, republished in 1674.

In 1624, Burgundus published at Antwerp his *Commentarius ad Consuetudines Flandriæ*, republished at Brussels in 1635, where the author treats of personal, real, and mixed statutes.

In Holland, in 1635, there was published the very distinct brief preliminary treatise by Rodenburg, *De Jure quod oritur ex Statutorum vel Consuetudinum discrepantium Conflictu*. And in Germany, in 1700 and 1716, Hertius wrote and published his acute *Dissertatio de Collisione Legum*.

In Holland, from the middle and towards the close of the seventeenth century, Paul Voet, in 1661, published his treatise, *De Statutis, eorumque Concursu*: and John Voet treats the same subject in his large work, entitled *Commentarius ad Pandectas*, under the title *De Legibus*.

In Holland there were published towards the end of the seventeenth century, and again in Germany in 1735, by Thomasius, the *Praelectiones Juris Civilis* of Ulric Huber, containing a brief but distinct dissertation, *De Legibus, et de Conflictu Legum diversarum in diversis Imperiis*.

In France, again, from the commencement to about the middle of the eighteenth century, there were published (1742) *Les Coutumes de Bourgogne avec les Observations du Président Bouhier*, and the *Mémoires concernant la Nature et la Qualité des Statuts*, par L. Froland. Finally, in 1766, appeared the great work of Boullenois, in 2 vols. 4to, entitled *Traité de la Personnalité et de la Réalité des Loix, Coutumes, et Statuts*—the most complete and best of all the French treatises on the subject.

From this notice of works, it appears the department

of law we are now contemplating was abundantly cultivated by the different jurists of the Continental nations. And these works certainly exhibit great ingenuity and acumen, and present a fair opportunity for the exercise of the practical discrimination of the student of law.

In England, on the other hand, as observed by Mr Justice Story and Mr Burge, little attention was for a long time paid to this branch of jurisprudence—partly, perhaps, from the Anglo-Saxon and Norman kingdom embracing the whole southern part of the island, and extending its laws over the smaller divisions into counties and hundreds, without being divided, like France or Spain, into separate and independent kingdoms or provinces, and partly from the English having carried their own national laws into Wales and Ireland. Indeed, but little attention generally appears to have been paid by the lawyers of England to the laws of foreign nations, or to the conflict of the laws of independent states, till the eighteenth century—apparently considering, and in many respects, though not in all, justly considering, their own system as superior to that of other nations.

In Scotland, a little earlier attention seems to have been given to this department of law than Mr Burge, in his late truly *magnum opus*, supposes. The reported decisions in this branch of the Scotch law go back to the commencement of the seventeenth century. Although the majority of the Scotch Judges continued till the latter part of the eighteenth century to hold the succession *ab Intestato* to moveable property to be regulated by their situation at the death of the proprietor, yet this is a point not without difficulty; and this judgment was corrected by the Scotch Court, in the case of Bruce, 25th

June 1785—of course before the latter judgment was affirmed by Lord Chancellor Thurlow, in 1790, in a formal speech, upon the ground of the succession in moveables being regulated solely by the *lex domicilii*. Although not familiarly acquainted with the treatises of Du Moulin and D'Argentré, Rodenburg and Boullenois, the Scotch lawyers, in prosecuting their study of the Roman civil law, could not fail to know something of the works of Voet, Huber, and Hertius, which have stood in their library for upwards of a century and a half.

When, in consequence of political events, religious intolerance, and other causes, a considerable portion of the population of England chose to emigrate and to settle on the eastern coasts of North America, they carried with them the laws of England. And it is a singular phenomenon, that in the United States of America the English common law should still retain its supreme authority in matters of private individual right. The emigrants and their descendants naturally formed themselves into small provinces, or states. And even while they remained under the British government, a number of varieties in the usages of these states must have grown up in the course of about two centuries. After the United States acquired their independence of Great Britain, the public law, the constitutional government, of course underwent a great change. But as the states of the confederacy continued to retain their internal independence and sovereignty, the peculiar local usages and rules of the common law of each state, so far as they differed from the law of England, remained entire. In this way the American United States came to be placed in a situation somewhat similar to that of the European



Continental states, before a uniform law in matters of private right was extended over the whole territory of each sovereign state and central government. From this diversity in laws and customs in the several states of the American Union, questions became frequent and various. And, observing how little had been done in England in this department of law, the late Mr Justice Story, in order to supply this want, resorted to the writings of the Continental lawyers before mentioned ; and, in 1834, produced his excellent *Commentaries on the Conflict of Laws*.

The temporary peace of Amiens, and still more the successful and glorious termination in 1815 of the war for the maintenance of European national independence, left Great Britain in possession of several of her maritime conquests, islands, or districts upon the sea-coasts, which had been originally colonised, or subsequently acquired and possessed for long periods, by other European nations. At the time these conquests were made, the internal private laws and usages of the inhabitants were usually reserved to them entire ; and to enable them to discharge their professional duties in the possessions thus acquired, as judges, barristers, or advocates, a certain portion of British lawyers were required to make themselves acquainted with the laws of Spain, France, and Holland. In this way, also, the occurrence of cases in which there was a *conflictus legum* became more frequent. And from his long colonial experience and observation of the events here alluded to, and their consequences, Mr Burge appears to have been led to devote his attention to this subject ; and possessing, at the same time, access to all the information to be derived from state documents,

produced in 1838 his *Commentaries on Colonial and Foreign Laws*, in 4 vols. royal 8vo—a most valuable work, and most interesting and useful to all persons concerned in, or connected with, the colonial dependencies of Britain.

We have already seen that, from the operation of particular causes, chiefly in France, Holland, and Germany, during the sixteenth, seventeenth, and eighteenth centuries, till towards the close of last century, the legal doctrines involved, or supposed to be involved, in cases arising from the *conflictus legum* underwent an earlier discussion than might otherwise have been expected; and the works left by the authors who wrote on this subject during these ages exhibit great ingenuity and acuteness. But the correctness and soundness of these views are more questionable.

This is noticed, first, by Mr Justice Story, and afterwards by Mr Burge; and the contradictions among these different writers are distinctly pointed out. But both these writers seem to have thought it unnecessary to discuss minutely the foundation of the mode of investigation adopted by the Continental jurists. And without entering on such a wide field of controversy, Mr Justice Story, in particular, appears to have aimed at the attainment of the object in view, by classifying the cases or questions which it was held the province of these laws, as being personal or real, or mixed, to decide; and to adopt, for that purpose, principles from other sources, chiefly those which had been recognised by judicial determinations in different countries. But, after remarking the unsatisfactory nature of the reasonings of the Continental writers, it would, perhaps, have been as well had both of these

late writers rested their doctrines less upon the works of these Continental jurists, as valid authorities, and not selected definitions and principles from these works.

In 1841, Dr Schaeffner published at Frankfort-on-the-Maine a work entitled *Entwicklung des Internationalen Privatrechts*, (Development of Private International Law,) in which he differs from Mr Justice Story, so far as the latter founds at all upon the Continental authorities of the seventeenth and eighteenth centuries. But this objection is only partially applicable ; for Mr Justice Story does not found solely upon the works of these jurists as authorities, and points out other and better founded principles for the solution of the questions arising from the *conflictus legum*. Dr Schaeffner, however, states another objection to the doctrine of Mr Justice Story, for which there is, perhaps, more foundation, and which we shall afterwards consider ;—that the *comitas gentium*, or *convenance réciproque*, is too general and vague a notion to be the foundation of a perfect right, or of compulsory law, and that, accordingly, jurists and courts of justice have rarely taken it as the basis of their decisions. We now come to the very learned work of Dr Fœlix, published at Paris in 1843, entitled *Traité du Droit International Privé, ou du Conflit des Loix de différentes Nations en Matière du Droit Privé*, in 8vo, 1843. In this work Dr Fœlix, who, we are informed, is a German by birth, and now a distinguished Avocat à la Cour Royale de Paris, considers chiefly, if not solely, the *conflictus legum* arising from differences in the laws of different nations, which alone are international questions, distinguishing this department of international law from the questions and doctrine of the *conflictus legum*

arising between subjects of the same state, which are, of course, entirely regulated by the internal jurisprudence, commonly, though inaccurately, called the municipal law of a country. And this treatise is, indeed, a superior production, not only as a work of scientific arrangement, simple, yet profound, but also a work valuable in practice, as exhibiting in detail the mode in which the questions arising from the *conflictus legum* between the inhabitants of different countries are decided by the codes, statutes, ordinances, and judicial determinations of these countries. With all its merits, however, we are still inclined to think that, in this treatise, Dr Fœlix rests too much on the Continental writers on the *conflictus legum* of the seventeenth and eighteenth centuries as valid authorities, or as conducting, in consistency with sound legal principle, by accurate induction, to satisfactory results. At the same time it was natural enough for Dr Fœlix, as a French lawyer, to be influenced by such great French authorities before him, as Merlin in his *Repertoire* and *Questions de Droit*, and as Toullier and Duvergier in their *Droit Civil François suivant l'Ordre du Code*, in still referring to the works of those jurists of the seventeenth and eighteenth centuries as authorities for the adoption of the *personnalité et réalité des loix*, as affording, or capable of affording, a satisfactory solution of the questions emerging from the *conflictus legum*. And it is not easy for the lawyers of a foreign country to form a correct opinion of the conduct of the lawyers of another country in treating such a matter. Nevertheless, having never been convinced by the mode of reasoning adopted by the Continental jurists of the seventeenth and eighteenth centuries, who wrote on the

*conflictus legum*, we were pleased to find its erroneous nature exposed in that country, in which it seems to have had its origin, by an acute and profound, though not perhaps an equally luminous writer — M. Mailher de Chassat, ancien magistrat, et avocat a la Cour Royale de Paris, in his *Traité des Statuts*, published at Paris in 1843.

Long after it was united under one king, France continued to be divided into a number of provinces and cities, each of which had a kind of subordinate sovereignty, a sort of supreme local or territorial jurisdiction, apparently independent of the legislative power of the kingdom, in the administration of the common consuetudinary law. The Crown from time to time caused to be prepared and issued, ordinances possessing legislative authority. But these ordinances related chiefly to affairs of state, such as finance, taxation, &c., or were confined to particular branches of the jurisprudence of the country, such as the Ordonnance du Commerce of 1673, and the Ordonnance de la Marine of 1681. But the ancient usages of the provinces and larger cities, which, though united under one great head, were as yet not half amalgamated into one nation, were left almost entire, to regulate the greatest part of the private rights of individuals. In these numerous *coutumes* of provinces and cities, such as the Coutumes de Bretagne, de Picardie, de Normandie, de Bourgogne, de Lorraine, d'Orléans, de Paris, de Chartres, de Marseilles, d'Anjou, de Bordeaux, de la Rochelle, de Toulouse, de Tours, de Troyes, the differences were great and frequent. And, puzzled with the *conflictus* or *collisio legum* thence arising, many of the most eminent lawyers of France, during the seventeenth

and eighteenth centuries, appear, with the best intentions, to have endeavoured to reconcile, or at least to discover valid legal principles upon which the *coutume* of one province or city should be held to prevail over that of another. These principles they seem to have thought they could find in the nature of the laws and usages themselves. They accordingly divided laws into personal, real, and mixed ; which last were held to be in some respects personal, in other respects real, with the view of determining which local law or usage should give place, and which should prevail. Nor does it appear the magistrates or judges and lawyers of the provincial courts of France were to blame, but rather that they deserved praise, for thus endeavouring to supply the defect in the intimacy of the union by which the different provinces and cities of France had been combined into one kingdom, and to establish, individually, greater uniformity in the administration of the common or consuetudinary law throughout the country. The laudable example, too, thus set by the lawyers of France, appears, from the works before mentioned, to have been followed by the lawyers of the United Provinces and Germany.

But, although their object was laudable, the Continental jurists in this department do not appear to have adopted the proper mode for attaining that object. They do not appear to have got upon the road which was to lead to the discovery of the truth. Indeed, it seems questionable whether personality or reality can be logically, or consistently with correct legal principle, predicated of laws. As applicable to mankind, laws are the rules by which the conduct of men, either in their private capacity as individuals, or in their political capacity as

nations or independent states, is, or ought to be, regulated and determined in their mutual intercourse with each other. There are no human laws relating solely and exclusively to things, or external material objects, moveable or immoveable, unconnected with persons. Agreeably to the doctrine of the Roman lawyers, rights are correctly enough divided into personal and real. By the former are understood, beside the right to the safety, integrity, and security of the person holding the right, certain particular powers of control over the persons, or at least over the actions, of other particular persons, *adversus singulos*, whether with reference to external things or material objects—viz. *jus ad rem*, as in the important contracts of sale or lease, or with reference to other persons, or in the incorporeal attributes of persons, such as the domestic relations of family and kindred, the social status of the individual, or his character or reputation in civil society. By the latter are understood certain particular powers of control, use, enjoyment, transference, and disposal, *adversus omnes*, over external things or material objects moveable or immoveable, to the exclusion of all other persons—viz. *jus in re*, such as the real rights of property, hypothec, lien, pledge, and prædial servitude. But independently of the incompleteness, if not absurdity, of a division of laws into personal and real, when there must be admitted a third head of the division—viz. mixed, as to which it is impracticable to decide whether they are either personal or real, except inasmuch as the one quality or the other may seem to predominate or preponderate—it does not appear how anything could reasonably be expected to be found in the quality of laws as being personal, or real, or partly both,

which could give to them any preferable station, any power, authority, or validity, the one over the other, beyond the territory and community in or for which they had been enacted or had grown up, such as to have a controlling and binding force in another and foreign state.

In the internal government of a country, united under one great head, but divided into provinces or smaller states, in other respects independent—such as France was during the sixteenth, seventeenth, and earlier part of the eighteenth century, or such as the United States of North America now are—effect might, or may, perhaps, be given to such distinctive qualities in law, through the direct or indirect instrumentality and exercise of the sovereign power, either in the shape of a representative central legislative assembly, or in the shape of a supreme court of law. But in questions arising out of a *conflictus legum* between the citizens or subjects of separate and independent states, we could never see how the *personalité* or *réalité* of laws could afford any rational ground for maintaining that the law of the one country ought to prevail over the law of the other independent state. And, although his language be strong, we concur with M. Mailher de Chassat in the following conclusion, to which he comes at the close of the second chapter of the preliminary title of his first book :—"It was, then, as ridiculous (*derisoire*) as absurd to undertake to resolve the questions which arise from the conflict of statutes or laws,—that is to say, of the power of the respective authority of each of them, by the mixture of the matters which they had for their object. It was to attempt to measure the power of the law by the very object to which



it is applicable, to limit the moral authority which constitutes all its force by the matter upon which it is exercised. Reason loudly condemned such an attempt ; for the law, having gone astray amidst discussions as empty as subtle, abandoned the great interests, which it was charged to govern and to regulate according to general views of the public welfare, to the cavils or sophistical arguments of the understanding, to individual caprice, and then to formidable abuses."

On the other hand, we cannot altogether agree with M. Mailher de Chassat, in ascribing entirely to the French Revolution the origin of more sound views in the department of law which is embraced by the *conflictus legum*, or in the terms which he substitutes for *personnalité et réalité*—viz., *nationalité et souveraineté*. We are well aware that one of the beneficial consequences of the French Revolution, to France itself, was the more complete union of the different provinces, and the amalgamation of her population under a strong sovereign power. We are also aware that, in the latter part of the last, and at the commencement of the present century, there arose in France a succession of able and excellent lawyers, who perceived the advantage, and had the industry and talents to digest a set of codes, establishing one uniform system of internal jurisprudence throughout the whole country. And while we are called upon so frequently to express our disapprobation of the conduct of Napoleon, in the abuse of his great talents, of his military successes, and of his consequent power, we willingly make an exception on this occasion, and cheerfully admit that in this department his ambition and energy, guided by Portalis, took the right direction, and hastened the accomplish-

ment of the event which had been previously contemplated, so as to give him a claim to the eulogy pronounced by the eloquent historian of the *Decline and Fall of the Roman Empire* on the Emperor Justinian : —“The vain titles of the victories of Justinian are crumbled into dust ; but the name of the legislator is inscribed on a fair and everlasting monument.”

But while the establishment throughout the country of a uniform system of national jurisprudence conferred such great benefits on the population of France, other countries, kingdoms, and states in Europe had not suffered so much from being composed of separate provinces, differing in their laws and customs, and possessing a sort of independent jurisdiction ; and, consequently, such kingdoms and states neither required, nor could benefit by, such a change in their internal jurisprudence as that which was effected in France some years after the Revolution, though perhaps not altogether completed even at this day. And in France, this internal amalgamation and combination of laws and usages into one uniform system, merely tended to diminish the number and frequency of the cases in which a *conflictus legum* took place. It did not reduce the number, or simplify the nature of the questions, which are properly international, or arise between the individual citizens or subjects of separate independent states. And accordingly, Mr Justice Story and Mr Burge, when they do not rely upon the authority of the Continental writers on the *conflictus legum*—from Du Moulin and Rodenburg to Hertius Huber and Boullenois—seem chiefly to direct their attention to the ascertainment of the cases in which an international *conflictus legum* may, or usually does, take place, and to

the application of otherwise generally recognised legal principles to the solution of these questions.

For the *personalité* and *réalité* of laws, M. Mailher de Chassat substitutes, in his late treatise, *Nationalité et Souveraineté* ; and, doubtless, nationality and sovereignty are the two great elements of international law. But, in endeavouring to solve the questions arising from the *conflictus legum* between the citizens or subjects of different independent states, it seems better, as in the common law or internal private jurisprudence of a nation, as well as in the law of nations in their intercourse as such, or in their corporate capacity, to consider the constitution of the human frame generally, mental and corporeal, the circumstances in which mankind are placed on this earth, and the events which take place around them. The following are, obviously, the more important : the mode in which the species is perpetuated, and the thence resulting relations of family, kindred, and succession ; the birthplace and the place of residence of the individual, and his locomotion by land or sea ; the division of mankind—from difference of race, seas, mountains, and other causes—into separate tribes or nations, each occupying a particular territory or domain, with an exclusive jurisdiction over things immoveable, and each constituting a separate independent sovereign state ; the internal arrangements of these states for their government—the legislative, the judicial, and the executive and administrative powers, the public constitutional law of the state, and the private jurisprudence of the nation ; the external intercourse of nations with each other ; the differences in the temperature of climates ; the differences in the produce of different countries, natural or indigenous, or

industrial ; the differences in the description and advancement of the industry of different nations ; the consequent exchange of commodities, or commerce.

Under these various circumstances and conditions or events, there are perceived to arise various juridical relations, justifying and requiring the application and use of physical force—views and feelings of justice, reciprocity, and general expediency. These juridical relations, as formerly observed, have been classed by jurists under a few heads, or maxims, such as “*neminem lædere, suum cuique tribuere, pacta servare, prædata aut abrepta restituere, damna resarcire, non alteri facere quod non tibi fieri velis, non ab aliis tibi postulare aut poscere quod non aliis tribuis ;*” and in reviewing in succession these circumstances and conditions, or events, or combinations of facts, in the intercourse of the individuals of different nations in which a *conflictus legum* usually occurs, and in applying to that collision the legal principles just referred to, we apprehend we shall arrive at a more sound and satisfactory solution of the questions, either as a part of the municipal or internal jurisprudence of each particular state, or as a part of private international law, such as has been, or ought to be, recognised by the usage and practice of civilised sovereign states.

These views we shall endeavour to follow out ; inquiring, at the same time, whether private international law rests entirely on the *comitas gentium*, or *convenance réciproque*, according to the system of Dr Fœlix ; or whether it does not rest on a higher principle, which in certain cases justifies the use of physical force, independently of human legislation, or of positive law, constituted by express convention or long-established usage.



## **CHAPTER II.**

**WHETHER, OR HOW FAR, PRIVATE INTERNATIONAL LAW  
RESTS ON THE COMITAS GENTIUM, OR CONVENANCE  
RECIPROQUE, OVER THE JURIDICAL OR LEGAL RELATIONS  
OF INDEPENDENT SOVEREIGN STATES.**



## CHAPTER II.

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THE questions and doctrines of the writers on the *conflictus legum*, so far as they arise or exist between the citizens or subjects of the same independent state, do not fall under, or form any part of, international law, properly so called. They are regulated entirely by the legislative and judicial powers of each sovereign state. And no sovereign, obviously, has any right to interfere with, control, or modify the legislation or judicial determinations of any other sovereign state. But when the questions and doctrines arising from, or consequent upon, the *conflictus legum* arise between, or affect the interests of, the citizens or subjects of different independent states, they clearly fall under international law ; and there can be no doubt that, in a variety of cases occurring between the individuals of different nations, from their intercourse for the purposes of commerce or otherwise, the judicial tribunals of one nation, in time of peace, actually have given, and do give effect to, and enforce, the laws of other nations, although different from their own, *ex comitate gentium*, as it has been termed. The question, however, here arises, whether this temporary or qualified relinquish-



ment of sovereign legislative or judicial power is merely voluntary, a matter of choice, or, at most, the discharge of a moral duty ; or whether it is the observance of a legal duty, or judicial obligation, which may be enforced—in other words, of a rule of compulsory justice.

For taking the former view of the matter, there are evidently strong grounds. Such seems to have been the leaning of the opinions of modern international jurists generally, from the description they give of the doctrines of the *conflictus legum*, and of private international law, existing, not *jure gentium*, but *ex comitate gentium*. Indeed, it is difficult to take any other view, consistently with the admission of the absolute, unlimited, and exclusive sovereignty of independent states. Accordingly, this doctrine was thus distinctly expounded early in the eighteenth century, by Ulric Huber, in his *Prælectiones ad Pand.* vol. ii.—De Leg. “Rectores imperiorum, id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.” And, in his *Jus Publicum Universale*, lib. iii. cap. 8, § 7, he adds—“Summas potestates, cujusque reipublicæ indulgere sibi mutuo, ut jura legesque aliorum in aliarum territoriis, effectum habeant, quatenus sine præjudicio indulgentium fieri potest. Ob reciprocam, enim, utilitatem, in disciplinam juris gentium abiit, ut civitas alterius civitatis leges apud se valere patiatur.”

The same doctrine has continued to be maintained, as we shall afterwards see, at greater length by the more recent international jurists of the present century—such as the late eminent professor and judge, Mr Justice Story, Dr Fœlix, formerly mentioned, and M. Mailher de

Chassat, the vigorous opponent of the Continental sect of jurists, and their adherents in this country—who attempt to solve the questions arising from the *conflictus legum*, affecting the interests of the inhabitants of different independent states, through the medium of the personality and reality, and mixed nature of laws, statutes, and customs.

On the other side, it is perhaps pushing, or admitting too far, the claim of right on the part even of independent states to absolute and exclusive sovereignty, to hold that they have no superior on earth, or in the universe, except the Eternal, Omnipotent, and all-wise Creator ; and that, although morally bound by the precepts of ethics, *præcepta virtutum*, they may, within and throughout their own territories, legally or juridically—except from their consent, expressed in conventions, or virtually implied from usage—act in any way they choose, and establish any laws they choose, with reference to foreign nations, and the individual inhabitants of whom they are composed, unless induced to act otherwise from wise considerations of reciprocal convenience. We are rather inclined to think with Grotius—the great parent of international law, who, it may be remembered, wrote early in the seventeenth century—and to agree with Professor Ortolan, in the following remark recently made by him, in his impartial review of the learned work of Dr Fœlix. “ Every nation,” as Dr Fœlix says, “ is too jealous of its independence to recognise any superior material power ; but the author is wrong in adding, or intellectual power. No human being, individual or collective, is above reason. It is precisely because each nation, in principle, has not any material power above it, that it ought to recognise

and follow that of reason, and that it pretends to honour reason, even when, in reality, it does not follow its dictates." In this remark there is certainly nothing new, nothing beyond the *dictamina rationis* of Grotius, or, perhaps, the *ratio juris* of the Roman law. But this use of the term "reason," either in English or French, may be liable to objections, philological or philosophical, such as those urged against it by Mr Bentham. And as the question is of importance, in international law, it seems to merit here some investigation, and, if practicable, elucidation.

As we could not discover in the qualities of human positive law, designated by the appellations of real, personal, or mixed, any valid ground for extending the operation of such positive laws beyond the territory of the state or government which established them, and are of opinion that, in the cases in which a *conflictus legum* occurs, the grounds for such extension must be sought in other considerations of a legal or juridical nature—so we can as little concur in the opinion of the writers on the *conflictus legum*, either in the seventeenth and eighteenth centuries, or in the present century, that the *comitas gentium*, or mere courtesy of nations, affords a stable basis for what can be truly or correctly denominated international law. Indeed, the more recent writers on the *conflictus legum*—such as Mr Justice Story and Dr Fœlix—while they apparently hold out the *comitas gentium* as the foundation of private international law, in cases where a *conflictus legum* occurs, seem, at the same time, to be sensible of the insufficiency of such a foundation. And, throughout his valuable treatise, Dr Fœlix seems to rest private international law, in cases

where a *conflictus legum* occurs, chiefly on the intervention of the consent of nations as expressed in treaties, or in their internal legislation and jurisprudence or judicial determinations, or as virtually implied from long-established usage.

Having observed, from the recent work of Dr Fœlix, that the objection which had occurred to us had been recently urged in Germany, we procured from that country the principal work referred to—that of Dr Wilhelm Schaeffner, published at Frankfurt-am-Maine, in 1841,—entitled *Entwicklung der Internationalen Privatrechts*, or, Development of Private International Law. And the objection is thus shortly stated by Dr Schaeffner in section 30 of his treatise: “The strange idea of *comitas gentium*, which originated in a totally perverted and erroneous notion of the nature of laws, appeared in many older writings, and is still to be found, at this day, in the work of Story. Now, if we examine more nearly how the principle of *comitas gentium* has been carried out, or succeeded, we perceive with astonishment that properly, or truly, it has nowhere been found applicable or fit for use; or, at least, that in most cases an appeal has been made to something quite different from *comitas*. How was it possible to attain a reasonable result from such infinitely vague and unjuridical ideas? In fact, we are not in a condition, upon this basis, to determine aright, even by the way merely of approximation, the most simple case of private international law. Where is the beginning, where the end, of *comitas*? How can questions of law be answered according to political considerations, which are the most changeable in the world?”

To this objection Dr Fœlix makes the following answer : "Section 12. An estimable author, but whose opinion we cannot share, has opposed to the doctrine of Mr Story that the idea of *comitas* is vague, and that it has rarely been taken by authors, and the courts of law, as the basis of their decisions. In fact, the expressions '*comitas gentium*,' 'reciprocal convenience,' present by themselves a very general idea ; but among the infinite number of relations which may emerge between different individuals belonging to different nations, it has been found necessary, in order to designate the whole collection of the considerations which may guide governments and judges in the cases of the conflict of laws, to employ expressions having a general meaning. In truth, authors and courts of law, instead of speaking of the *comitas gentium*, and their reciprocal convenience, have entered into philosophical reasonings. But, at bottom, the arguments of this description constitute merely motives of reciprocal convenience (*ob reciprocam utilitatem*) for the two nations to admit into their respective territories the application of foreign laws ; and then we return always, from such arguments, to this fundamental principle, that the application of foreign laws is merely a concession, and cannot be exacted as a right. We repeat it ; all nations are too jealous of their independence to recognise a superior judge having by himself the power of deciding that a foreign law shall be carried into execution in another state."

Now, this answer appears to us to be unsatisfactory on more grounds than one ; and we shall endeavour to investigate the matter a little more minutely.

The idea of compulsion, or physical force, by such

means as are placed at the disposal of mankind on this earth, is, we apprehend, inherent in, and essential to, the idea of human positive law. If a rule of action possesses not this essential quality, it is not, strictly and properly speaking, a law; the obligation to observe or act in conformity with it is not legal, but ethical, not warranting the use of compulsion—although such observance, in the latter case, may be much more meritorious and praiseworthy.

The great Adam Smith, it is believed, was the first philosopher in this country who distinctly pointed out a most important distinction between justice and the other virtues, inasmuch as the chiefly negative rules of justice are susceptible of enforcement, while the rules of the other virtues are not. But, to appeal to more recent authority, one of the most acute, precise, and profound descriptions of laws in general, is, perhaps, that given by Count Destutt de Tracy, in his *Commentaire sur l'Esprit des Loix de Montesquieu*, which he wrote for Mr Jefferson, President of the United States of North America, in 1811, and which he afterwards published at Paris in 1819. And as the work does not appear to have attracted general notice in this country, we shall make a pretty full extract from the Commentary, book i. p. 1, 2, &c.

“Laws are not, (as Montesquieu says,) necessary relations which flow from the nature of things. A law is not a relation, and relation is not a law. This explanation does not present a clear meaning or signification. Let us take the word ‘law’ in its specific and particular sense: this acceptation of words is always the first which they have had; and we must always trace back

to it, to understand them well. In this sense we understand by a law, a rule prescribed for our actions, by an authority which we regard as having the right or title to make this law. This last condition is necessary; for when it is wanting, the rule prescribed is no longer anything but an arbitrary order, an act of violence and oppression. This idea of law comprehends that of a punishment attached to its infringement; of a tribunal which applies this punishment; of a physical force, which causes it to be undergone. Without all this the law is incomplete and illusory.

“Such is the primitive sense of the word ‘law.’ It has been, and could have been, created only in the state of civil society, already commenced. Afterwards, when we remark the reciprocal action of all beings upon each other; when we observe the phenomena of nature, and those of our intelligence; when we discover that they operate, all in a constant manner, in the same circumstances, we say, that they follow certain laws. These are what are called natural laws, or laws of nature. \* \* \* There are, then, laws of nature which we cannot change, and which we cannot disobey, with impunity. For we have not made ourselves; and we have made nothing of what surrounds us. Thus, in so far as we shall leave a heavy body without support, we shall be crushed by its fall. In so far as we shall not make arrangements, in order that our desires may be accomplished, or, what is the same thing, in so far as we shall cherish in ourselves wishes which cannot be executed, we shall be unhappy. That is beyond doubt.

“There, the authority is supreme, the tribunal infallible, the force insurmountable, the punishment

certain ; or, at least, everything takes place as if all that were so.

“ Now, in our societies, we make what we call positive laws, that is to say, artificial or conventional laws, by means of our authorities, our tribunals, and our factitious forces. These laws, then, must be conformable to the laws of our nature, must be derived from them, must be the consequences of them, and not contrary to them ; without which, it is certain, the latter would prevail, that our object will not be fulfilled, that we shall be unhappy. It is that which makes our positive laws be good or bad, just or unjust. The just is what produces good ; the unjust is what produces evil.

“ The just, then, and the unjust, exist before positive laws, although it is only the latter we can call just or unjust ; the others, the laws of nature, are simply necessary ; our part is no more to judge of them than to contradict them. Doubtless there is a *just*, and an *unjust*, before any of our laws. If it were not so, there would never be any of them ; for we create nothing. It is not to us that it belongs to cause a thing to be conformable or contrary to our nature. We do nothing but observe and declare what is wrong or reasonable, according as we deceive ourselves or not. When we proclaim as just a thing which is not so, that is to say, when we order or command it, we do not thereby render it such, which would be beyond our power ; we merely proclaim an error ; and we do a certain quantity of evil, by giving for support to this error the quantity of force of which we dispose. But the law — the eternal truth, which is contrary to it—remains the same.

“ We conclude, then, that the laws of nature are





necessity for the application of foreign laws cannot be derived *à priori* from legal fictions, or the supposed nature of law, as real, or personal, or mixed ; and that any legal obligation to admit, in certain cases, the recognition of foreign laws, can only rest upon the relations of different nations towards each other. But when these juridical relations are not conceived or imagined, *à priori*, as a *beau idéal*, such as Rousseau's *Social Contract*, but are observed as actually existing between nations, there seems no reason for excluding the recognition of these relations in private international law—viz. in the intercourse of the individuals composing different nations, for the purposes of social life, for the cultivation of art and science, or for the more frequent purposes of commerce and the exchange of commodities, either direct or by barter, or through a circulating medium—any more than in what has long been recognised as public international law, in negotiation through public ministers, in concluded treaties of peace, and in established usages regulating the mode of warfare during hostilities.

The difficulty here seems to arise from the inaccurate idea generally entertained of the mode in which the law is held to be formed, and the right thereby created. Born and living in an advanced stage of civilisation, we find the legislative and judicial powers distinctly established ; statutes enacted, and judicial precedents recognised as obligatory ; and that no right can be inferred, and the performance of no actions compelled, except through the state or government, and particularly its judicial establishment. And thence we conclude, not only that no right exists, or can be enforced in civil society, unless it has been enacted by the legislature, or has been or may

be decided by the judicial tribunals, but also that the right is solely derived from, and rests upon, the statute and common law thus established.

Now, the first of these conclusions is well founded; but the second is only partially so. It is no doubt true, that, in their union into civil societies or communities, occupying separate portions of the earth, as territories, whether voluntarily or by conquest, or other compulsory measures, it has been found urgently expedient or necessary to have the united power of the community or state concentrated in a government, containing, among others, two important powers—that of framing, beforehand and prospectively, regulations for the conduct of the individuals of whom the nation is composed; and the other, that of enforcing those statutory regulations, and also of determining such disputes generally as may arise among such individuals, without involving any breach of any statute. But it is not true that all the judicial relations of individuals living together in civil society arise entirely from, and are solely founded on, either the statute or the judiciary law of a country. A certain portion do; and may be called factitious rights, and created by human power and legislation. But the great portion are founded on the juridical relations which arise and come to be perceived and felt by individuals, from the circumstances in which they come to be placed with regard to each other, in consequence of their position on this earth, their connection by birth, and the various events which occur in the progress of society. And most of these relations arise, and are felt and conformed to, or observed, voluntarily, and without any previous enactment or judicial determination.

The gradual formation and development of the internal jurisprudence of a people has been certainly very fully, and satisfactorily, and beautifully illustrated by the celebrated M. de Savigny, partly in his Treatise in 1814, in answer to that of Thibaut, which procured him the title of the founder of the historical school of law, but chiefly in his still greater work first published in autumn 1839, in which he farther explained and modified his views, so as to exclude neither the doctrines of the philosophical school, so far as founded in fact, nor the due regard to be paid to nationality in every system of law.

Between separate and independent nations, certainly, no such legislative and judicial powers exist, to enforce their respective rights, as among individuals living in the same state. But as, in a state, a great proportion of the rights of individuals arise from relative position, connection by birth, and other supervening circumstances and events, and are not derived from, or founded on, any pre-existing enactment of the legislature, or judicial determination, so do such rights arise among nations in relation to each other, and the individuals of whom they are composed, without any anterior legislation or judicial determination, enacted or pronounced by any superior sovereign state. Indeed, it would be absurd to say, that, without a pre-existing positive human law, without a previous enactment by a legislative body, or a previous judicial determination, as an example or precedent, individuals, when assaulted in their persons, have no right of self-defence ; or, that nations, when their territory is invaded, and their existence endangered, have no right to resist such aggression ; or that individuals or nations,

who have been violently or clandestinely deprived of their habitations, or of their goods requisite for the maintenance or comforts of life, have no right to enforce restitution of possession, or re-delivery of those articles, if still in existence, or to exact by force adequate reparation ; or that individuals or nations, who have entered into engagements by contract or treaty, or occasion damage by their illegal acts, are not thereby bound, or are not liable in damages for breach of contract or injury inflicted ; or that individuals or nations, who avail themselves of the good faith of others for their own advantage, are not bound to exercise and exhibit equal good faith towards others ; or that individuals or nations are entitled to exact from others what they do not themselves allow to others.

In fact, then, the positive law, as it is called, does not precede, far less create, the right. The right precedes the law, and the law merely ascertains and declares the right, and applies the machinery for its enforcement. Under and in virtue of the social union, the enforcement of the right is accomplished by the power of the united many against the few ; by the power of the state or government. Among separate and independent states, no compulsory power of this kind exists, other than war, and the union of several states against one or more. But, although the machinery for enforcing the right among nations is very inferior, the right, nevertheless, exists. Nor is this right a mere fiction, or mere imaginary *beau ideal* of law, *à priori*. It exists in consequence of the relative position, connection, and circumstances, in which, in the course of events, individuals and nations come to be placed. In a grossly ignorant age, some

rights may not be perceived and felt. But in general, the more important are perceived and felt without great difficulty. And it would be quite unphilosophical, if not absurd, for such a limited intellect as the human to deny absolutely the existence of what it does not perceive.

We are aware, as formerly noticed, that, after the example of many learned and able jurists, the late Mr Justice Story, where he did not derive it from the personality or reality of statutes, rested private international law on the *comitas gentium*, and that Dr Fœlix has adopted that theory, as being the best. We are also aware that the same opinion has been expressed by perhaps a still greater jurist than either of these, M. de Savigny, in his great work, of which the publication commenced in autumn 1839 ; and our confidence in the opinion we have formed is, no doubt, shaken by such authority. But it may be remarked, that the attention and studies of the transcendent jurist last mentioned have been chiefly directed to the origin, progress, and gradual development of the internal jurisprudence of nations ; while, in his last great work, he has allotted only one short section to international law. And if Professor Savigny had studied the latter as minutely and profoundly as he has studied the private law, or internal jurisprudence of nations, we conceive he would, upon his own principles, have found that, between nation and nation, and between the individuals of whom they are composed, there exist or arise various *Rechtsverhältnisse*, or *rappports de droit*, or juridical relations, from neighbourhood or vicinity, from commercial or other acts of intercourse, and from other events and combinations of

circumstances, similar, or at least analogous, to those which he found to arise between, or among, individuals living together in civil society, without any anterior legislation or *Gesetzgebung*.

If, indeed, this *comitas gentium*, on which private international law has been founded, this voluntary civility or courtesy, this rule of reciprocal benevolence or beneficence, be converted into a rule of justice by the mutual consent of nations, the objection will be removed. For the effect of this consent is to transform the rule of ethics into a rule of law, susceptible of enforcement by physical means. But when the *comitas gentium* is, by such consent, transformed into positive law, which may be done by express convention—as by treaty, or virtually, though tacitly, by implication from long-established reciprocal usage, (in the same way as a willingness to benefit another by giving possession, delivery, or use, may be converted into a legal obligation by contract between individuals)—it is no longer *comitas*; and it should not receive such an appellation, being, thenceforward, positive international law.

But, even without such consent, we are humbly of opinion, that private international, as well as public international law, has a foundation in the human constitution, and in the circumstances in which men are placed; and under the events to which they are subjected in this world, independently of their consent, either express, or implied from their habitual action.

It is a clear deduction from the experience of ages, that, in order to make any advancement in art and science, in order to enable them to resist wild animals, to procure food for the propagation of the species by

cultivating vegetable produce and taming animals adapted for their sustenance, men must unite in civil society ; must occupy a particular portion of the earth as territory ; must have an exclusive power over that territory ; must concentrate the power of the individuals living together in society, in the community or state ; must exercise that power thus produced by union for putting an end to private war, as it has been called, and for bringing about a state of quiet and tranquillity, in which individuals may occupy themselves for their respective purposes of procuring food, and clothing, and habitation, bringing up their families, accumulating necessities, acquiring intelligence and skill, and transmitting their various acquisitions to succeeding generations. But all these and other similar purposes, it is plain, may be attained, without ascribing to each separate and independent nation an absolutely exclusive and despotic power over its own territory, subject to no restriction or control whatever, on the ground of a separate nation having no superior on earth. For, first, independently of the superiority which, we formerly saw, Professor Ortolan ascribed to reason, or what Grotius termed the *dictamina rationis*, a separate state may possibly have, physically, a superior on earth. The union of two or three nations may create such a material and effectual superior. Or the operation of those physical laws which the Almighty Creator has established on earth may raise up such a superior ; as, when the grievous oppression exercised by the French Emperor Napoleon over the conquered nations of Germany roused the slumbering mass of population to such a pitch as empowered their governments, with the military aid and the supplies for the subsistence of their



armies which the wealth accumulated by British industry enabled that government to afford, ultimately to humble and extinguish the most powerful sovereign who has appeared in modern times.

But, secondly, even supposing that separate and independent states have, in point of fact, no physical or material superior on earth, it by no means follows that nations are not subject to juridical relations and legal obligations with regard to each other. For this latter proposition is by no means inconsistent with the two fundamental principles of private international law which Dr Fœlix lays down in Chapter III. of his Preliminary Title, under the authority of various jurists, such as Burgundus, Rodenberg, Voet, Cocceii, Huber, Story, Vattel, Meyer, Boullenois.

“The first general principle,” he says, “in this matter, results immediately from the fact of the independence of nations : every nation possesses and exercises, solely and exclusively, the sovereignty and the jurisdiction within and throughout the whole extent of its territory. From this principle it follows, that the laws of each state affect, bind, and regulate, *pleno jure*, all the properties, immoveable and moveable, which are found in its territory, as also all the persons who inhabit this territory, whether they are born in it or not ; in fine, that these laws affect and regulate, in the same manner, all the contracts concluded, all the acts or deeds consented to or performed, within the boundaries of this same territory. Consequently each state has the power of regulating the conditions under which all things, immoveable and moveable, existing within the limits of its territory, may be possessed, transmitted, or appropriated, as also to determine the

state and the capacity of the persons who are found there, as well as the validity of contracts and other deeds which have originated there, and the rights and obligations which result from them; finally, the conditions under which actions or suits at law may be instituted and followed out within the limits of this territory, and the mode of administering justice." Now all this seems quite correct, with an exception, perhaps, or modification, relative to the place where contracts are to be implemented or executed, or to be set aside and annulled.

In the second principle laid down by Dr Fœlix we also concur: "No state, no nation, can, by its laws, directly affect, bind, or regulate, objects or matters, which are situated out of or beyond its territory; or affect and oblige the persons who do not there reside, whether they be subjected to it by the fact of their birth or not. This is a consequence of the first general principle; the contrary system, which would give to each nation the power of regulating the persons and things existing without its territory, would destroy the equality between different nations, and the exclusive sovereignty which belongs to each of them.

"These two principles," continues Dr Fœlix, "lead to an important consequence, and which contains our entire doctrine—namely, that all the effects which foreign laws can produce in the territory of a nation depend absolutely upon the consent, express or tacit, of that nation."

Now this inference, or deduction from the two principles before enumerated, we cannot admit to the unlimited extent here laid down. So far as nations remain in a quiescent and sort of negative state, in relation to each other, and have no intercourse, the deduction may be

correct. For although it seems to have been held, that a nation during a famine, and in a state of starvation, may legally send out ships of war, and seize cargoes of grain on board vessels sailing on the high seas, provided they pay to the owners of the cargoes the market price of the grain, and the freight and other charges due to the owners of the vessels, it must be an extreme necessity indeed which would warrant one nation to invade the territory of its neighbour, for the purpose of seizing part of their stores of grain or other provisions, and we by no means contend for the existence of such a legal compulsory right. But if nations once pass from this negative state of internal quiescence, and, from whatever motive, the individuals of one nation go, and are admitted into the territory of another nation, there then arises a juridical relation, a *Rechtsverhältniss*, a *rapport de droit*, involving an obligation on the latter nation and its government to protect the persons of such individuals from assault, and their goods from violent or fraudulent abstraction, to the extent, at least, to which they afford such protection to their own citizens or subjects.

Or, if one nation, or its government, admit the individual subjects of another independent state to purchase its produce, or to sell their goods, which produce cannot, or is not to be delivered for some time, or the price of which goods cannot or is not to be paid for some time, is not the nation or government admitting such intercourse legally bound, through the medium of its judicial establishments or otherwise, to enforce the delivery of such produce, or the payment of the price of such goods, when due? Or, is such an act on the part of the nation, in its collective or corporate capacity, a mere act of benevolence or

favour, which may be withheld or not at pleasure, or performed merely from courtesy, *ex comitate gentium*, and with a view to *convenance réciproque*? Would not such a government, in refusing to give effect to the contracts or conventions which it had allowed to take place between its subjects and those of foreign states, be countenancing and supporting, if not committing, acts of injustice? Would not such a refusal justify measures of retorsion, or, if on a great scale, constitute a just cause of war, a *casus belli*?

This might be further illustrated by an enumeration of a variety of particular cases; but this seems unnecessary. In short, when in the intercourse of the individuals of whom different nations are composed, juridical relations arise, or the rules of justice, which are distinguished from the other virtues by their susceptibility of enforcement, are involved, and the question is no longer moral or ethical merely, but juridical or legal—what is universally expedient to enforce—private international law, like public international law, will be found to rest, not merely on the *comitas gentium*, the courtesy of nations, or *convenance réciproque*, but on the same juridical principles, which we have seen precede the positive laws, established under and in virtue of the social union. The necessity for the individual intercourse of nations may not be so indispensable, for the quiet enjoyment of life and its comforts, and for the advancement of the species in civilisation, as the union of individuals in one society and under one government. But still the advantages of, the necessity for, the intercourse of nations with each other, afford sufficiently grave considerations for the observance and to warrant the enforcement of those rules of justice,

which in civil society protect life, person and property, award reparation of damage, compel the performance of contracts, and secure to the succeeding generation the property of their progenitors under the legal precepts, *neminem lædere, suum cuique tribuere, pacta servare, damna resarcire*.

What we maintain, then, is, that the sovereignty, dominion, and jurisdiction of independent nations is absolute and exclusive, only within its own territory, or that portion of the earth which it has physically occupied and appropriated ; that when an independent state allows its citizens or subjects to have intercourse with the inhabitants of other states, for the purposes of commerce or otherwise, and to enter into connections or transactions similar to those into which its own subjects enter with each other, and which are enforced by the state under the social union, the state itself, as well as its inhabitants, thereby creates juridical relations, and comes under legal obligations, which it is bound, and may be legally compelled, to see or cause to be fulfilled. So far, we apprehend, private international law does not rest upon the *comitas* or courtesy, or upon the mere consent of nations, but may be legitimately enforced by such physical means as such states have at their disposal. Nor does it seem necessary, for the true independence and welfare of nations, to push their exclusive right of sovereignty so far as seems to be done by the jurists of the present day, or to make private international law entirely dependent for its existence on the consent of each separate nation. For the true independence and welfare of nations, it seems quite sufficient that the absolute sovereignty of each state should be limited to its own territory, to the

exclusion of all foreign control or dictation ; that its laws should regulate the conditions on which all properties, moveable or immoveable, within its territory, are held, appropriated, or possessed, transferred or transmitted ; should determine the state and capacity of the persons resident within its territory ; should determine the validity of all contracts and other deeds which have originated therein, and the resulting rights and obligations ; and should determine the conditions on which actions or suits at law may be prosecuted. Such appear to be all the powers and rights necessary for, or involved in, the idea of national independence. And to admit that each nation has a sovereignty beyond these powers, dependent entirely on its consent, or its mere will and pleasure, or caprice, is to recognise, not genuine liberty, but licentious rule.

In the preceding observations, we have arrived at the conclusions, that the qualities of laws, as real or personal, do not afford valid grounds for the solution of the questions in private international law, arising from the *conflictus legum* ; that the *comitas gentium* is but a very unstable basis for any system of compulsory law ; and that the sovereignty, independence, and welfare of nations do not require recourse to be had to such an unstable basis, or to any other basis, than to those juridical relations and legal principles on which the common law, or internal private jurisprudence of civilised nations, is in a great measure, if not entirely, founded. In the next chapter we shall notice the leading cases in international law in which a *conflictus legum* usually occurs, or is likely to occur, and the chief juridical considerations and legal principles according to which it may be the duty

of the judges of a civilised nation to administer justice between natives and foreigners, in some cases agreeably to the laws of their own country, in other cases agreeably to the laws of the country to which the foreigners belong.

## **CHAPTER III.**

**HOW PRIVATE INTERNATIONAL LAW IS TO BE ENFORCED.  
CASES OF CONFLICT OF THE LAWS OF SEPARATE INDE-  
PENDENT STATES.**



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## CHAPTER III.

HOW PRIVATE INTERNATIONAL LAW IS TO BE ENFORCED.

—CASES OF CONFLICT OF THE LAWS OF SEPARATE  
INDEPENDENT STATES.

IN the preceding observations we trust we have shown—

I. That there is nothing in the qualities of laws, designated by the terms personal, real, or mixed, which affords any satisfactory grounds for the solution of the questions involved in the *conflictus legum*, or for warranting the extension of the laws of one state into or over the territory of another, or for determining of which state the law is to preponderate and predominate over that of the other.

II. That, on the other hand, the independence and sovereignty of states do not entitle them to establish such laws and issue such orders within their own territories with regard to foreigners as they may think fit, in the event of their having intercourse with foreign nations for commercial or other purposes ; that mere *comitas*, courtesy, or convenience, dependent on the will or caprice of nations, cannot become the basis of any valid compulsory right ; that, so far as not founded solely on consent, the basis of private international law must be sought in other more stable and onerous considerations than courtesy or convenience, and can only be found in legal or judicial considerations, such as those on which the internal jurisprudence or private law of states rests.

While, however, we thus place the principles of private, as well as public international law, as being co-ordinate with, or on the same level and footing with, the principles of the private common law in civil societies or states—with the principles of the just and the unjust, which precede all human legislation, and which the legislative assemblies and judicial tribunals of nations, in the course of generations, merely so far observe and record—unfold, establish, and enforce—we by no means undervalue the positive private international law which arises in the course of civilisation from the consent of nations, either express or implied and virtual, though tacit. When the consent is expressed in national treaties, the private international law thereby created may be termed conventional. Such treaties are peculiarly adapted for the regulation of the intercourse of nations in commerce during peace, and form an extensive and important part of positive private international law between the contracting parties ; but they do not extend beyond these parties, or beyond the time to which they may expressly or by implication be limited. They form no part of the common or general private international law ; and the multiplication of such treaties can never establish a rule binding upon third parties, or generally upon nations, because each treaty, however often repeated or multiplied, is *ex facie* confessedly an exception from the general rule or practice, which could not be enforced except under the treaty, otherwise there would be no occasion for entering into it ; and because there is in all bi-lateral contracts, as observed by Savigny, an element of free-will, arbitrary choice, or option.\*

\* "System des Heutigen Römischen Rechts," i. § 29, s. 174.

Positive private international law may also be constituted otherwise than by treaties or mutual conventions. It may be constituted by the uni-lateral act of a nation. Thus, if a government promulgates an internal law within its own territory, but affecting the interests of foreigners, which it is clearly entitled to do, yet if foreigners, acting on the faith of that law, acquire rights, the nation is bound to fulfil the obligations which the rights so acquired may imply. In the same way, without any formal mutual treaty or convention, nations by long-established usage in the intercourse of their individual citizens or subjects may become bound to each other. And in this way various internal regulations by states, affecting foreigners, may become part of positive private international law against such states in relation to other states, not resting merely on *comitas* or courtesy, but legally binding, and susceptible of enforcement upon the same principle as an individual living in civil society, who is under no obligation to perform a particular act, may become bound to do so either by express contract, agreeably to the rule *pacta sunt servanda*, or the recognised maxim that reasonable expectations, for which adequate grounds have been afforded or held out, cannot *bond fide* be, in justice or legally, disappointed.

But besides this limited private international law, resting merely on consent, either expressed in particular treaties and special conventions, or in uni-lateral statutes, ordinances, and proclamations, or implied from long-established reciprocal usage, we have seen there is also a general private international law, which is not merely a matter of *comitas* or courtesy, to be observed at pleasure or not, if found inconvenient—not mere ethical rules,

*præcepta virtutem*, but in reality a branch of what we call law, susceptible of physical enforcement under and in virtue of the juridical relations which arise in the intercourse and mutual dealings of the inhabitants of different countries and states. And upon this footing we inquire how the rules of that law, or the rights and obligations under it, may be enforced during peace without nations resorting to war or physical force in their corporate capacity? In the progress of civilisation, experience shows each nation comes to have, among other internal institutions, a legislative and a judicial power and establishment. The former prescribes rules for the conduct of the individuals of whom the nation is composed, and establishes what is called the statute law of the nation; the latter recognises such rules of justice as have grown up in the practice and inveterate usage of the people, and decides disputed claims, its decisions becoming precedents for the future—thereby developing what is called the common law of a country. Farther, the latter—the judicial establishment—enforces and gives effect, under certain sanctions, both to the statute law and the common law of the nation.

Such being the state and condition of the governments of civilised nations, it appears that, without nations going to war, the rules of compulsory justice in the ordinary business transactions of life, which are enforced by the courts of law of one state between or among its subjects, may also be enforced by these courts when the transactions take place between the subjects of that state and the subjects of other states. And the question comes to be—How is this to be done?

When the laws of independent states are identical or

very similar, no difficulty can exist; because, in the foreign country, we receive the same or similar justice as in our own courts, and foreigners in our courts receive the same or similar justice as in their own. It is only when the laws of separate and independent states are different that the *conflictus legum* can arise.

As the number of cases, in which the laws of different countries vary, appears from experience to be indefinite, and to pervade almost all the departments of the private internal law of a nation, it seems unavoidable, in the discussion of the various questions of the *conflictus legum*, to run over in a cursory manner the whole range of that private internal law. Anything like an exhaustive analysis is perhaps not to be aimed at; but a sufficiently comprehensive view, it should seem, may be accomplished, by taking one of the most recent and best arrangements of the subjects of private law. And so far as they were not guided by, and did not rely upon the Continental writers of the seventeenth or eighteenth centuries on the *conflictus legum*, as authorities, this is what Mr Justice Story, Mr Burge, and Dr Fœlix, appear, to a great extent, to have done—the two latter in a more full manner.

Agreeably to this theory of there being no foundation for private international law, but the *comitas gentium*, the good-will, or consent of nations, Dr Fœlix finds it necessary to detail, and details briefly, but in a comprehensive manner, the particular internal laws of the different European nations, on points where a *conflictus legum* occurs. This is also what Dr Schaeffner appears to have attempted to do, and to have so far succeeded in doing. And we cannot agree with Dr Fœlix in opinion,

that the theory of Dr Schaeffner is arbitrary, and does not rest upon the relations of different nations to each other, except perhaps in so far as the latter seems to give a predominance to the special dispositions of the country in which the question arises. For, "in the absence of such special dispositions," Dr Fœlix admits, pp. 21, 22, that Dr Schaeffner holds, we must "appreciate each position or situation of man, each act of his civil life, according to the laws of the place where this position has been taken, or this act has had its birth;" whilst Dr Fœlix himself maintains, that, except from *comitas* or courtesy, each nation is entitled to regulate, and very frequently does regulate, the decision of the questions involved in the *conflictus legum* by its own special ordinances.

Upon more profound inquiry, we conceive, it will be found that neither the reality or personality or mixed nature of laws, nor the mere *comitas gentium*, nor even the special legislation of each nation, actually regulate the decision of such questions; but the legal considerations and principles applicable to the facts and circumstances of each case—such legal principles and considerations as decide the questions between individuals in private law, or internal jurisprudence;—the considerations of facts and circumstances, and of legal principle, and juridical relation, by which we are accustomed to be guided in unfolding the internal common consuetudinary law of a state.

We proceed, then, shortly to notice the different departments into which the private law of states, civil and criminal, has been divided. And, in the private civil law, after the individual person, capable of, or

invested with rights, we shall, agreeably to the order suggested by Professor Savigny, first consider real rights—the rights immediately connected with things, or external material objects, chiefly those more subservient to the subsistence, clothing, and lodgment of men on this earth—because the greater part of what have been called personal rights require and presuppose a knowledge of real rights.

To begin with persons as capable of, or as invested with rights, viewing the human being as an insulated individual, detached from the other members of the species, and contemplating his position on this earth, and the events of his life and death, as invested with certain rights in relation to his own person, we find, besides the power of exercising his corporeal and mental faculties, his birth, or origin among a certain tribe or nation, or in a particular country, as distinguishing him as a native, in contrast to a foreigner; his parentage, or his birth of married or unmarried persons, as determining his legitimacy or illegitimacy; his growth and age, as involving infancy, puberty, minority, majority, and old age; his place of permanent residence or domicile, as constituting him an inhabitant of a particular country; his locomotive power and change of permanent residence, as affecting his nationality. These circumstances are obviously all attributes of the person of the individual, and may with great propriety be denominated personal rights. And it is almost intuitively perceived, that questions respecting these rights must, from the nature of things, be determined by the laws of his own country, and permanent residence acquired.

When the individual has had his birth and permanent



residence where his parents were born and have resided, or where they have another subsequent permanent residence, or when the individual has acquired a new nationality by a change of permanent residence, the idea of questions relative to such rights being determined by the law of a foreign country, or by any other law than the *lex loci originis et domicilii*, would be absurd. If a foreign tribunal truly intend to administer justice in such cases, it must give effect to the law of that country, by which alone they can be decided. The calling the law which recognises such rights *personal*, as the Continental jurists did, and the deduction that, in such cases, the law follows the person, and that this personality of the law gives it a predominance over the law of the foreign country, where such questions are required to be decided and enforced, seem to be a needless circuitous mode of arriving at a very manifest conclusion.

Having thus noticed the *conflictus legum*, so far as it occurs in questions affecting the rights of the insulated individual regarding his own person, or corporeal and mental frame, we proceed to the rights with which that individual is born, or comes to be invested, over, or with reference to, external objects, separate and distinct from his own person. These external objects are either things, including unorganised and inert matter, the lower animals, and vegetable productions; or the particular actions of other individuals, designated by the Romans *obligationes, præstationes*; by Mr Bentham, *-services*; and by several of the late German jurists, *obligations*; there being no civil right to the persons, or to the entire control of all the actions of other men,—which would be slavery.

The rights to and over things are, the primary and most important one—the right of property—the exclusive right of possessing, using, and disposing of things, directed against all and sundry persons, *adversus omnes*; and the subordinate real rights, composed of parts of the right of property, such as lease for a definite period, pledge, mortgage or security, lien, or right of retention, rights of rural or urban servitude.

Of the various distinctions of things, the most important, in a juridical or legal point of view, is the division into things moveable and immoveable. With regard to things immoveable, as we are here considering the intercourse and consequent juridical relations of individuals as members of different independent nations, the most important object, in point of legal right, dominion, and appropriation, is the territory of the nation, divided among its inhabitants into different portions, allotted to and forming the landed estates of these inhabitants. Indeed, the idea of territory, or a portion of this earth occupied for habitation, and cultivated for subsistence, is involved in the more complex notion of a state. And it clearly follows, from its sovereignty, independence, and exclusive jurisdiction, that all questions regarding the acquisition, possession, enjoyment, transference, transmission, or disposal otherwise, of the immoveable property in that country, lands, dwelling-houses and other buildings, erections or structures, attached to the ground, must be regulated by the laws of that country within which these lands or properties, forming part of, or attached to, the territory, are immoveably situated, not by the laws of any other country. The immoveable nature of the object of the right, its situation, and the

absolute sovereignty and exclusion of the interference of foreigners which each state must have within its own territory, for its own safety and independence, preclude any other rule.

The moveable effects, again, which are subservient to the subsistence, clothing, and other wants and comforts of mankind, have not, like immoveable landed estates, any fixed seat or position in the place where, in point of fact, they may happen to be for a time ; they are connected with, and in a manner dependent on, the person of the individual to whom they belong ; and they are subject to his disposal, and to any destination he may choose to give them. In a rude or early agricultural age, the moveable wealth bears a very small proportion to the landed wealth of a nation, consisting chiefly of personal clothing and dress, household furniture, and ornaments ; the annual crops of grain and other vegetable produce ; and the animals which are so far tamed and reared from time to time. There do not, then, exist the large mercantile, manufacturing, and banking capitals which are accumulated in the course of ages, and in the progress of civilisation. Moveable effects are thus, in these early times, viewed as very secondary to landed estates, and as attached and subservient to the person of the owner. And even afterwards, at a more advanced stage of civilisation, in the course of the various exchanges which become necessary in the intercourse of life, it is found convenient, and for the general welfare, that the rights to such moveable effects should be held to be regulated, not by their own position, so constantly liable to change, but by the permanent situation of their owner.

Nor ought this to be called a fiction of law. Such

fictions are not admissible in general law, or jurisprudence, national or international, but only in positive consuetudinary civil law, to enable the judge, without the intervention of the legislature, to correct the hardship of a rule, which was once found useful, and was established by usage, but which, in practice, has become hurtful. The rule or practice of holding rights to moveables, to be regulated, not by the situation of these moveables, but by the domicile or permanent residence of the owner, has obviously arisen from the physical difference between them and immoveable landed property, and their early intimate connection with, and subservience to, the use and disposal of the owner. Accordingly, when this intimate connection between the person of the owner and the moveables as an accessory does not exist, or is not the point at issue, the rule of practice just referred to does not take place. It takes place only where the moveables appear as an accessory to the person of the owner, as in the succession *ab intestato*, in contracts of marriage, in uni-lateral deeds *inter vivos*, in deeds of a testamentary nature. But it is not applicable where this intimate connection with, and subserviency to, the uses of the owner, do not exist, or are not the points at issue ; as where the property in moveables is claimed and contested, where an appeal is made to the maxim that the fact of possession of moveables constitutes a good title, where one exercises the right of pledge, or any of those rights of execution, which prohibit the alienation of, and attach and transfer moveables by ultimate adjudication or confiscation. In such cases, moveables are viewed as the objects of real rights, and the *lex rei sitæ* is the rule.

So much for rights to things moveable and immoveable. The other class of rights are rights to the actions of other men, styled services by Mr Bentham, and denominated obligations, undertaken or incumbent on others, by M. de Savigny. These rights arise from so many juridical relations consequent upon original position and circumstances, or created by human actions and other subsequent events. These juridical relations may be either particular, occasional, and temporary, or comparatively general and permanent.

Occasional and temporary juridical relations arise from the uni-lateral acts and deeds of individuals—legal, such as acts for the behoof and interest of others, without express authority or *negotiorum gestio*, deeds *inter vivos*, and deeds of succession—or illegal, such as delinquency or violation of civil right, involving the obligation of restitution or reparation; or from the bi-lateral acts and deeds of individuals, such as the numerous class of conventions or contracts.

Uni-lateral deeds *inter vivos*, or of succession, chiefly gratuitous, are obviously to be construed, and their import and effect to be determined, according to the laws of the country where the granter or disposer has been born and resided, or has taken up his permanent residence, the *lex loci originis, vel domicilii*, as being the only laws with which he can be presumed to have been acquainted, or to have had in view. If such deeds relate to the disposal of immoveable property in a foreign country, the execution of the will of the deed must bend and yield to the primary rule which, we have seen, the independence and safety of nations has imposed in relation to property forming part of the territory. If the deed requires its

execution in a foreign country, that execution must be effected agreeably to the law of that country, because the granter, by the special terms of the deed, obviously had that law in view. When the uni-lateral act is a delinquency or violation of right, the reparation ought to be determined in, and according to the law of the country where the violation has taken place, because the fact of the violation can there be best substantiated or disproved, because the amount of reparation can there be most correctly ascertained. When the uni-lateral act is for the behoof of others, without express mandate, as in the *quasi* contracts, in uni-lateral engagements or authority, and in gratuitous deeds of succession, the law of the domicile of the party binding himself, and of the testator, is the rule of interpretation for ascertaining the validity of the deeds, as being obviously the law to which the parties looked.

With regard, again, to bi-lateral deeds or contracts, their validity, in point both of form and of substance, must, in general, be determined by the law of the country where they are entered into and concluded ; because that is the law which the parties must be presumed to be acquainted with, and to have had in view—except in the case of both parties being of the same nation, when, although the contract be entered into in a foreign country, the parties are presumed to have had in view the law of their own country, as being that with which they are best acquainted. Where the parties are of different nations, the law of the country where the contract has been entered into is still the rule ; because the foreigner, if he does not stipulate otherwise, must be presumed to have had in view the law of the country where he transacted

the business, and where the contract was best understood, and could be most effectually proved and enforced.

When the parties, either expressly or by implication, virtually agree that the contract is to receive its execution in a foreign country, as by the delivery of the goods purchased, or by the payment of the stipulated price, the law of the country where the execution or fulfilment of the contract is to take place must be the rule, because such is the law according to which the parties have agreed the contract should be enforced. Agreeably to these principles, in bills of exchange, the form and validity of the draft and indorsation are regulated by the law of the country where they are made; and the acceptance and the payment, by the law of the country where the former is granted and the latter is to be made.

With regard to the incidental consequences of contracts, as distinguished from their immediate effects, arising from *mora* or delay, negligence, or other failure or culpability, in the performance of what has been undertaken, they appear to be regulated by the law of the country where the acts or omissions occur that give occasion to them.

The other branch of the class of rights to the actions of others, the comparatively general and permanent, comprehends those which arise from permanent juridical relations, chiefly created by marriage, by birth, and by death; such as the reciprocal rights of husband and wife, parent and child, and of the other individuals more distantly related, or connected by blood, namely, kindred—denominated by M. de Savigny the law of family, and the law of succession.

As being a contract, marriage, so far as regards its celebration, or the mode in which it is entered into, appears to be regulated by the law of the country in which it takes place, by the *lex loci contractus*. When the parties go from home to a foreign country, to be married, merely for the purpose of eluding the observance of the forms prescribed in their own country, the majority of writers on the subject appear to hold the marriage invalid. But the opposite is perhaps more correct, inasmuch as the intention, will, or consent of parties, cannot be much affected by the validity of extrinsic forms ; and so it seems to have been settled in Great Britain. But where the validity of the marriage depends upon the intrinsic solemnities or requisites, such as the personal capacity of the parties to enter into, or consummate the contract, it appears to be regulated by the law of the nation to which the parties, or either of them, belong—the *lex domicilii*.

With respect to the patrimonial interests of the husband and wife, so far as not arranged by the marriage contract, the conjugal society or communion appears to be regulated by the law of the domicile of the husband at the time of the marriage ; subject always to the special exception of immoveable property, for the paramount reason before stated. And according to the opinion of most writers on the subject, (Mr Justice Story, however, dissenting,) this conjugal partnership with regard to estate or property does not appear to be modified by any subsequent change of domicile or nationality. For it would certainly be not very consistent with justice to permit the husband, who has the power of changing the domicile and nationality of his wife, as well as his own,



desire to nullify, for his own personal advantage and profit, the matrimonial interest of the wife in the conjugal partnership, is fixed at the time of the marriage.

With regard again to the dissolution of the marriage by divorce, on the grounds of minority, desertion, or other failure to discharge the duties of the husband or wife, it does not appear that this matter has any necessary or essential connection with the law of the country where the contract was entered into. It rather appears this matter should be regulated by the law of the country where the parties have all along had their permanent residence, or where the acts or omissions, which justify the divorce, have taken place or occurred: as in the case of the incidental consequences of ordinary contracts, arising from delay, negligence, or other culpability. And as to the peculiar doctrine of the English law, that a marriage contracted in England is indissoluble by any court of law, it is manifest that such a marriage is not absolutely indissoluble; for it is admitted that such marriages may be dissolved even in England by an act of the legislature. And the legality of divorce for adequate reasons being thus recognised by the legislative practice of England, it does not appear there are valid grounds in law for other countries being held bound to give effect to this qualified indissolubility of a marriage contracted in England—to this singular and peculiar institution of England, apparently less calculated for ascertaining the real grounds for divorce than a judicial investigation; or why the courts of other countries, where the parties reside, or where the acts or omissions justificatory of the divorce have been committed or occurred, should not pronounce a decree of divorce, after due

inquiry and ascertainment of the facts, agreeably to the law recognised in these countries.

The rights of the children of the marriage, when not determined by the marriage contract, or other deeds of settlement, are, of course, regulated by the law of the country where the parents have had their domicile, and where the children have been born and had their residence—the children, upon the death of the parents, becoming invested with the estate of the parents, either by continuation of a sort of joint right of property to a definite extent, or by a right of succession. And the rights of the children or grand-children, and of the collateral kindred, whether the succession be testate or intestate, are in general regulated by the law of the country where the testator, or the deceased, had his domicile. If the estate of the deceased embraces lands, houses, and other buildings constructed on lands, we have seen the succession is regulated by the law of the country where these material objects are situated, under a rule deemed necessary for the independence, safety, and welfare of nations. But if the estate succeeded to consist of claims of debt or moveable effects, the law of the country or domicile of the deceased person is the rule, from moveables having no permanent situation, and being considered as accessory to persons.

In a former part of these observations, we trust we succeeded in showing that private international law did not rest solely and entirely on the *comitas gentium*, or courtesy of nations; but that, in their commercial and other intercourse, nations incurred juridical or legal obligations susceptible of enforcement; that after admitting and engaging in such commercial intercourse,

civilised nations became bound to give the aid of the machinery of their internal judicial establishments to foreigners, for the enforcement of their well-founded claims, and that a refusal to do so afforded, and amounted to, a just cause for war.

As to the existence of such a compulsory right, there seems to be no room for doubt or dispute. The only difficulty is to ascertain to what extent this compulsory right goes. And here we do not propound the compulsory right as extending beyond reciprocity. At the same time, it is manifestly for the interest of all nations to carry the reciprocal aid afforded to foreigners by their respective courts of law a great deal farther. And we may shortly notice what progress has been made, in this respect, by the civilised commercial nations of Europe. As, during the natural and ordinary condition of peace among civilised nations, the rights of the subjects of one state can only be enforced against the subjects of another through the courts of law of the latter state, the subjects of the former must of course resort to the tribunals of the foreign nation ; and the rule of the Roman law holds, *actor sequitur forum rei*. And as judicial establishments, in the progress of civil society, are entirely an internal institution of each nation, the forms of judicial procedure are of course regulated by the law of the country where such establishments exist, and where the demand and application to them are made. Any other rule would be manifestly inconsistent with the sovereignty and independence of nations.

A foreigner may be a plaintive against a native, or denizen, or subject of the realm ; and, in such an action, the foreigner is usually required to find security for ex-

penses of process, in order to protect the subject against rash actions undertaken by foreigners, who, after having failed or succumbed in their suits, would not afford, or leave, the defendant any means of obtaining re-imbursement of the expenses thus groundlessly incurred by him.

By the law of nations, as recognised in almost all the countries of Europe, foreigners are likewise held entitled to apply for the intervention of the judges of every country, even against other foreigners. But in such actions of one foreigner against another, the defendant is not authorised to exact security for expenses. In actions against foreigners as defenders, the generally recognised maxim, as before observed, is, *actor sequitur forum rei*. But to this general rule there are in different countries several exceptions, or rather, perhaps, additional grounds for holding foreigners amenable to courts of law ; such as the *forum rei sitæ*, (founded in the possession of immoveable property,) the *forum contractûs*, the *forum arresti*, the *forum administrationis gestæ*, the *forum reconventionis*, the *forum connexitatis causarum*, the *forum concursûs creditorum*. But, in sustaining such grounds of jurisdiction, judges ought, of course, to see that due measures have been taken for giving the defender sufficient intimation of the demand, and that he be allowed ample time for urging his defence.

When the parties, foreigners and denizens, or subjects of the realm, have made appearance in court, and joined issue, or *litis contestatio* has taken place, the proceedings in the suit must obviously be regulated in point of competency by the law of the nation which has established the tribunal ; and here the chief step towards the judgment, when averments in point of fact are disputed, is

the proof by the parties of their respective statements by legal evidence. This evidence has been recognised among the civilised nations of Europe as consisting—1st, Of writings, formal, judicial or extra-judicial deeds, private writings, books of merchants, &c. ; 2dly, Of parole proof, or by witnesses, generally admitted, where it is not to set aside, or add to, formally concluded deeds or writings; and, 3dly, Of oath of party upon reference. When there is a *conflictus legum* in proof by writing, the law of the country where the formal deed was executed, or the less formal writing composed, or the merchants' books kept, must be taken as the rule; and, in the case of parole proof, and of presumptions being founded on, the rule must be the law of the country where the contract was entered into, or other business transacted; where the facts to be proved took place, when the admissibility or credibility of witnesses is questioned; or where the presumptions appear to have been established, and so generally known as that they could not fail to have been in the view of the parties.

Any unusual, or extraordinary, or *ex facie* groundless refusal by a foreign court of any of the generally recognised modes of proof, seems, among the civilised nations of Europe, to constitute a ground of national complaint, and of *retorsio juris*, if not of actual hostilities.

Commissions by the courts of law of one country to obtain information from the judges of the courts of law of foreign countries, with regard to the competency and grounds of the judgments pronounced by the latter, which the former are called upon to enforce, are frequent among the European nations; and commissions by courts of law to take proofs by witnesses, foreigners, or resident

in foreign countries, and for the recovery of writings, are still more frequent, in some cases unavoidable, and in general useful, where there is no better mode of obtaining evidence.

Provisional measures for the security of the creditor, before the action is instituted, or before the judgment is pronounced, are likewise recognised by the civilised nations of Europe, such as the arrest and imprisonment of the person of the foreign debtor till he find security, the seizure or attachment of his effects, or of the debts due to him, and the prohibition against his alienating his immoveable property. Questions respecting the expediting or engrossment of judgments are obviously to be determined by the law of the country where they are delivered or demanded. When registration is required as a mode of publication, as in the changes of immoveable property, in the constitution of hypothecs, exclusive privileges, or other real rights, the formalities of the registration are to be judged of by the law of the country where the immoveable property alienated or burdened is situated, not by the *lex loci contractûs*. The registration of a company must take place and be judged of where the company has its seat, as also the publication of the dissolution of the copartnership. The publication of a failure or bankruptcy must be made and judged of according to the law of the country where it has openly taken place.

But of all the international questions of a judicial description, the most important are those which concern the effects or the execution of the judgments pronounced by the tribunals of a nation in foreign countries. And, no doubt, the sovereignty and independence of states

appear to require that no foreign judgment should be put in execution without the sanction and authority of the judges of the country where the execution is to take place. From this, however, it by no means follows that any nation or its judges are entitled to consider the authorising such execution as a favour, which they may grant or withhold according to their good pleasure or caprice, or absolutely and unconditionally refuse. Such an arbitrary power is not necessary for the independence or safety of any nation. Indeed, the laws of different countries appear to differ only on the question, whether the authority for the execution of foreign judgment should be granted simply upon application being made, or only after a thorough revision of the whole contested matter. That a previous inquiry, to a certain extent, may be necessary for the welfare as well as safety of the foreign nation, is not disputed. But what are the limits of this inquiry? Should it be limited to competency, assuming the legal correctness of the foreign judgment?—or should it include an examination of its merits, to ascertain if justice has been done to the subjects of the realm?

Now, no state, it seems plain, is entitled to insist on the judgments of its tribunals being executed, or receiving effect in a foreign country, except for the protection and the free exercise of the rights of its subjects, and for the performance of the legal obligations which the subjects of the foreign state have incurred to them, by contract, or from other legitimate causes. The different modern international jurists, from Vattel downwards, propound the following conditions as necessary to entitle a nation to have the judgments of its courts of law enforced in a foreign country:—1. That the court shall have been of

competent jurisdiction, whether according to the nature of the litigation, or in virtue of conventions, express or tacit, between the two nations. 2. That the pleader for the foreigner shall have been heard, agreeably to the forms prescribed by the laws of the country where the cause has been adjudicated ; and that, on a footing of complete equality with the subjects of that realm, he shall have had the means of recourse to a higher tribunal, in all cases where that recourse is permitted. 3. That at bottom, and on the merits, the cause shall have been judged according to the laws of the country, and that the decision be final and in the last resort. When these three conditions are united, it is held by these international jurists that a second process upon the same grounds, or for the same cause, ought in all countries to be rejected and dismissed, by the *exceptio rei judicatæ*, whether the party who has been unsuccessful be a subject born in the country where the sentence has been pronounced, or has there simply established his residence.

To these conditions, laid down by the modern international jurists, we add the principle of reciprocity : not that such a principle can entitle a nation which adopts the more liberal practice to compel another to adopt that practice, but simply that the nation which observes the rigid practice must submit to the same practice being adopted by other nations in their conduct towards it — *Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur*.

Nay, we go farther with M. Fœlix, and add the following conditions :—That, to entitle a nation to have the judgments of its tribunals given effect to in a foreign country, these judgments must contain nothing contrary



to, or inconsistent with, the sovereignty of the foreign nation, or the public law of the state, or its legitimate national interests, or with the competency of its tribunals, or its revenue laws ; nothing sanctioning slavery, or polygamy, or incest, or other crimes or offences ; nothing sanctioning what is specially prohibited by the laws of the foreign country, such as lotteries ; nothing contrary to the public law of nations, such as furnishing arms and other military stores to the enemies of the nation.

But upon the preceding conditions, and with the preceding exceptions, we humbly conceive a nation is legally or juridically bound, and may be compelled by physical force, to give effect to the judgments of foreign courts of justice. In consistency with his general theory of private international law having no other foundation than the *comitas gentium*, M. Fœlix maintains that the rule we have just been considering, which he finds so generally recognised, not only by the jurists who have written professedly on public international law, but also by the internal regulations and practice of a number of nations, ought to be ascribed to, and the motive or reason for the adoption of such a common principle to be sought, not in theories *à priori*, but in considerations of *comitas*, translated "*bonne amitié*," and of reciprocal convenience, (*ob reciprocam utilitatem*;) which have determined nations to depart from the rigour of the law.

While, however, we concur with M. Fœlix in disapproving of theories *à priori*, and in inculcating the cultivation of feelings and considerations "*de bonne amitié et de convenance réciproque*," we must still dissent from his opinion, that private international law has not another and a stronger foundation. We disapprove, as

well as he, of what he calls theories *à priori* founded on fiction, such as the social contract of Rousseau, which never had nor could have any existence or obligatory force. But when we find theories founded, not on fictions of the imagination, but on actual observation of phenomena, of particular facts and events, on logical generalisation and arrangement, and on correct induction in the science of law, such as the latest and greatest work of M. de Savigny exhibits, we cannot reject, as theories *à priori*, the productions of such original genius and profound thought. We cannot help thinking that M. Fœlix, to whose abilities, learning, and laborious researches the students of international law are so much indebted, has here allowed his otherwise just disapprobation of fictitious theories *à priori* to carry him too far, and that he has been led to form too limited and narrow a notion of what he calls the strict or rigorous law, as founded on the sovereignty, independence, and exclusive jurisdiction of nations. And we submit, as the result of our investigation, that, under the conditions and exceptions before specified, the obligation on a nation and its tribunals to give effect to the judgments of the tribunals of a foreign nation, rests upon the same legal principles, the same juridical relations, as are the foundation of the greatest part of the laws recognised and enforced by the machinery of the judicial establishments in the interior of civil societies.

Even with this more definite and firm foundation for private international law, there is still ample field for the exercise of that "*bonne amitié*," and regard for "*convenance réciproque*," of which, along with M. Fœlix, we beg earnestly to recommend the cultivation. For, while

we do not urge the legal or juridical basis of private international law farther than the principle of reciprocity, *quod quisque juris in alterum statuerit, ut ipse eodem jure utatur*, we find that, in giving effect to the judgments of foreign courts, there is a difference in the actual practice of nations. Nay, we find from the learned researches of M. Fœlix, that, according to their internal regulations and practice, the difference is very considerable in the measure and extent of the peaceful, judicial, reciprocal aid given by the courts of law of the different European states.

The British courts, without requiring reciprocity, and assuming or taking for granted the rectitude, on the merits, of the judgment of the foreign tribunal, with a laudable liberality do not inquire into the merits of the cause, but merely, when applied to, and satisfied of the competency of the court and proceedings, interpose their authority, so far as necessary, for carrying into effect and executing the judgment, by the compulsion of personal constraint, or attachment of property, moveable or immoveable.

In France, and in the other countries which have adopted the recent legislation of France, such as Belgium, Rhenish Prussia, Rhenish Bavaria, Rhenish Hesse, the Low Countries, Tuscany, the kingdom of the Two Sicilies, where the judgment of the foreign court is adverse to a Frenchman, or subject of the other states just mentioned, the courts of law refuse to interpose their authority, unless the judgment be opened up, and the whole cause examined and debated anew on the merits. Whether this be a suitable fulfilment of the reciprocal obligations of private international law, we shall not here

stop to inquire. It rather appears a nation cannot be legally or juridically compelled to adopt the more liberal rule, upon the principle of reciprocity, beyond the *retorsio juris*. But it might be for the interest of the inhabitants of the countries just mentioned, that their courts should not in such cases require a new trial on the merits, and thereby expose these inhabitants to a *retorsio juris*. And it seems strange that so civilised, so polite, and so great a nation as the French, should not have adopted a more liberal policy.

Among the smaller states of Germany, upon the condition of reciprocity, the reciprocal execution of the judgments of their respective courts of law was the ancient common law, and is the present practice. In Austria, and the Lombardo-Venetian kingdom, in Prussia, in the kingdoms of Bavaria, Würtemberg, Hanover, and Saxony, in the grand-duchies of Baden and of Hesse, and in the duchy of Brunswick, the same principle of the reciprocal execution of the judgments of foreign tribunals prevails, under certain conditions very similar, and of which the chief are, reciprocity in the observance of this rule, and the competency of the foreign tribunal. In the majority of the Swiss Cantons, the German principle of reciprocity appears to prevail. At Geneva, it appears, the parties must be again cited and heard, unless otherwise regulated by treaty. In Denmark, the practice is to suffer the execution of foreign judgment, under the twofold condition of reciprocity, and the competency of the court by which the judgment has been pronounced. In the Pontifical States, the execution of foreign judgments is granted under the conditions of reciprocity, and of the sentence having acquired the force of a *res judicata*.

In the kingdom of Sardinia, the execution of foreign judgments against subjects is supported on the condition of reciprocity, competency of the foreign court, regularity of procedure, and the absence of any grave or evident injustice.

The other states of Europe, besides those before noticed, without having adopted the recent French legislation, do not appear to recognise the principle of reciprocity. Thus in Spain and Portugal, the foreign judgment seems to be admitted merely as an article of evidence in a new trial. In Russia, the judgment of a foreign court does not seem to have any execution, except after a new and thorough investigation of the cause. In Sweden and Norway, the foreign judgment seems merely to be admitted as an article of evidence in a new action.

Even where the laws of the different countries happen to coincide, as sometimes happens, the less liberal system of judicial administration is productive of a great hardship—the delay and expense of a new trial on the merits. And this hardship is more grievous where there is a *conflictus legum*, and there is room for the discussion of the additional question—Of which country ought the law to preponderate and predominate, as the rule of decision? Nay, the opening up of the foreign judgment, and the requiring of a new trial in favour of a subject of the realm against a foreigner, may frequently have the effect of absolutely defeating the ends of substantial justice. The farther discussion of the law of the case, indeed, may only increase the evils of delay and expense; while, at the same time, with ordinary fairness, the application of the law to the case is likely to be best understood in the

country where the transaction took place. But, with regard to the facts of the case, it may frequently be quite impracticable, from the death or absence of witnesses, and from the loss of documents, to adduce again the same or equivalent evidence.

In considering the doctrines of private international law, where there is a *conflictus legum*, as applicable to the claims of civil right arising from the illegal acts of others, as giving rise to the obligations of restitution or reparation, we saw that the delinquent might be prosecuted in the *forum delicti*, and judgment pronounced according to the *lex loci delicti commissi*. And there does not appear to be any valid reason why the person who has suffered from the illegal act should not be allowed to insist against the delinquent in the *forum domicilii*, or even in the *forum deprehensionis*.

Where the illegal act is of a heinous nature, an offence or crime such as to warrant punishment on the part of the community, government, or state, or on the part of another nation or state, the natural and ordinary rule seems to be the law of the country where the crime is committed, where the law has been violated, and where the evidence of the criminal act can best, if not solely, be obtained. And here we agree with M. Foelix in thinking that a branch at least of what is usually called criminal law may be correctly enough held to belong to private international law; for we do not view criminal law as always, or entirely, a part of the public or constitutional law of a state. So far as offences are directed against the state, or punished merely at the instance and for the behoof of the state, the criminal law clearly belongs to the public or constitutional law. But so far as offences

are prosecuted merely for preventing in future, or making reparation for the infringement or violation of the rights of private individuals, we conceive such procedure belongs to the private law of a nation. The machinery employed for such purposes — the judicial establishment — is, no doubt, the creation of the social union, and proceeds from the state or government. But so does the judicial establishment for the ascertainment and enforcement of the civil rights of private individuals. And if the latter be admitted, as a part of the private law of a state, so also ought the former.

When a state admits foreigners into its territory for commercial or other purposes, it becomes bound to afford them protection in permitted matters of intercourse, a juridical relation or *rapport de droit* being thereby created. On the other hand, foreigners are bound to observe the laws of the country into which they are admitted. And every foreigner may be prosecuted in a country or state, where he has a temporary residence, for crimes or offences committed by him within the territory of that state. Different states by their internal laws regulate the punishment of crimes and offences in different ways ; and they may do so without any infringement of the rights of other nations. If a native, or other subject of a state, be accused of having committed an offence in a foreign country, his government is entitled to insist on his having a fair trial according to the laws of that country.

It does not appear that, as a general rule, there is ground for prosecuting in one state a foreigner on account of an offence perpetrated by him in another state, unless that offence has been productive of injury to the former

state, or its subjects. But where a prosecution takes place in a state other than that in whose territory the offence to be punished has been committed, the law of the country where the prosecution is instituted appears to be the rule.

No state authorises the execution within its territory of judgments pronounced in criminal matters by foreign tribunals, against the person or the property of an individual, so far as regards the penalty and its accessories. It is otherwise with judgments merely awarding civil reparation.

Opinions differ on the question, whether the law and usage of nations bind each state, when required by another state to deliver up the person of an individual accused of an offence or crime, committed in the territory of the latter state. In what may be denominated private criminal law, in ordinary crimes or offences, directed against the persons or properties of private individuals, such as murder, robbery, theft, when a suspected criminal escapes from his own country, other states seem bound to give him up for trial in his own country, or at least not to give him an asylum. And it does not clearly appear upon what valid, legal, or juridical grounds a government can refuse to deliver up the accused person for trial in his own country, or persist in affording him an asylum, or can, in virtue of its sovereignty and independence, have a privilege to protect a common murderer, robber, or thief.

In what may be termed public criminal law, in crimes or offences directed against the state, or existing government, in which the illegality of the act may appear doubtful, and which may involve political questions



between nations, the obligation to deliver up the accused does not appear to have been recognised. And there appears to be ground for the distinction.

Finally, whether governments ought ever to interfere for the protection of the alleged claims of their subjects as individuals, arising merely from mercantile transactions, beyond requiring justice, as distributive by the courts of law of the country of the individual alleged to be liable—viz. by menace of war or actual war—admits of grave doubts. There are countries, we have seen, in which a very scanty aid is afforded to strangers; and merchants and others must judge for themselves if they will run the risks incurred by trading with such a country. They are generally tempted by the lure of great profits, and in most cases should be left to provide for their own security. They should know the state of the law in the countries with which they trade or deal; and not, when unsuccessful or disappointed, call in the aid of their own country to help them out of their losses or disappointed speculations, by the menace or the use of armed force, in concerns of which the governments of both countries may be equally ignorant. War is productive of great injury to individuals, and would in general be a greater evil than the wrong inflicted.

We have thus rapidly run over most of the cases and questions between the citizens or subjects of different states and governments, in which a *conflictus legum* has occurred, or is likely to occur; and we have not found any occasion to resort to what are called the personality or reality of statutes, laws, and usages, or to any other considerations than those which we recognise in the growth and development, and in the exposition of the

internal common law of states. We have endeavoured to show that private, as well as public international law, rests upon principles more definite and stable than the mere *comitas* or courtesy of nations, dependent on their goodwill and pleasure—namely, upon what the Romans called the *ratio juris*, upon juridical relations, which arise in the course of their mutual transactions and dealings with each other. And this we conceive may be done, not by reasoning *à priori*, or by any arbitrary supposition or fiction, such as a state of nature, which never had any existence ; but by an appeal to actual observation, experience, and reasoning, *à posteriori*—by an induction from the particular cases in which the juridical relation takes place—upon the perception of which there is observed uniformly to arise in the minds of men, from their natural constitution, a feeling of what is just or unjust in the circumstances, a judgment of what individuals have a right, or are entitled to do, in the use of compulsion by physical force or otherwise. And the conclusion we thus deduce from the uniformity of the feelings and judgments of mankind in particular cases—namely, distributive justice, reciprocity or liberty of action, limited by the condition of all other individuals having the same liberty—will be found to be confirmed by, or to be coincident with, the general welfare of the individuals contemplated, or with universal expediency.

It is essential that the sovereignty, independence, safety, and security of nations be maintained ; and that for this purpose a jurisdiction, exclusive of all foreign dictation, should be recognised within their own respective territories. But there is no occasion for pushing this sovereignty and exclusive jurisdiction to such an extent

as to maintain that nations, and the individuals of whom they are composed, cannot incur any legal or juridical obligation, susceptible of physical enforcement against them, except of their own free will and pleasure. That the tenure, possession, enjoyment, transference, disposal, and transmission of the various immoveable properties of individuals, forming parts of the territory of the state, should be entirely regulated by the law of that state, is sufficiently obvious. But that it may be not only consistent with, but also necessary for, the attainment of many of the substantial purposes of compulsory justice in the general and particular, and especially in the commercial intercourse of the individuals of different nations, that the laws and judgments of the tribunals of foreign states should be taken into consideration, and receive effect, appears to be almost equally obvious. And in thus giving effect to the laws and judgments of the tribunals of foreign states, it is manifestly not the personality or reality of these foreign laws, but the constitution and connections of the individuals who are interested as parties, the circumstances in which they are placed, and the laws which they had in view, and by which they intended to abide and be regulated, in entering into their various bi-lateral transactions or conventions, and in executing their various uni-lateral deeds *inter vivos* and testamentary, that are to be regarded, inquired into, ascertained, and recognised as guides in pronouncing judgment.

THE END.

## APPENDIX

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As the late Mr R. Plumer Ward, in his History of International Law prior to the age of Grotius, and in his separate treatises ; and as the late Lord Jeffrey, one of the Senators of the College of Justice, (distinguished no less for his high critical talents in general literature, than for his acute discernment of legal principle in general jurisprudence,) are authorities in legal science, including the law of nations, it may not be out of place to subjoin the following extracts from letters addressed by them to the author, on receipt of copies sent by him to them of his Treatises on General and Maritime International Law, in order to show that these authorities concur with the author in the soundness and perfect fairness of his reasoning and views ; particularly when he maintains, in opposition to Lord Stowell, that George III., as sovereign of an independent state, could not, by an Order in Council, any more than Louis XIV. by an Ordonnance de la Marine, alter any rule of the law of nations, established either by treaties to which such nations are parties, or by immemorial custom or usage ; unless perhaps directed, during war, to counteract an aggressive act on the part of the enemy in violation of the previously recognised laws of war, in which act neutrals have voluntarily acquiesced.

*Extract of Letters, R. PLUMER WARD, Esq., to the AUTHOR.*

“ LONDON, MAY 25, 1843.

“ SIR,—Mr Blackwood forwarded to me the book with which you honoured me, and I assure you that the gift is the highest compli-

ment I ever received. Were it an ordinary book, what you are pleased to say of my early attempts on the same subject would flatter me much ; but the work being, as it plainly appears from its arrangement, its research, and its learning, so valuable an accession to professional literature, the good opinion of its author confers upon me an honour," &c.

"LONDON, MAY 5, 1845.

"DEAR SIR,—I have received your valuable book from Mr Blackwood, and find it fully entitled to the epithet I have given it of *valuable*—so much so, indeed, that I think no lawyer's or statesman's shelves should be without it and its precursors. I do assure you, that I am quite struck with their learning, research, and perspicuity. I have seldom read reasoning so powerful ; and in answer to your inquiry, can safely assure you that I entirely agree with you in every word you have said, against the, to me, most inconclusive attempt of the modern jurists you have refuted, to set up a conventional law of nations, upon, at very best, most sandy foundations," &c.

*Extract Letter, LORD JEFFREY to the AUTHOR.*

"MY DEAR REDDIE,—I had the pleasure of receiving your obliging letter some days ago. But it was not till yesterday that I had the gratification of finding the book ; and I am happy to say that I have already read, with great interest, little less than half its contents—not straight on certainly, from the beginning, but passing from topic to topic, as I was tempted by the titles, or attracted backwards and forwards by references. I am very much struck by the soundness, completeness, and perfect fairness and clearness of your views, as well as by the singular compass of learning and power of digestion it displays. I suspect your analysis will generally be thought more elaborate than can always be justified by the merits of the works to which it is applied ; and there are, no doubt, repetitions which, to those who go attentively through the whole, will appear superfluous. But to those who consult you for particular purposes, they save a great deal of trouble ; and, on the whole, I think that in this respect you have erred on the safer side," &c.

Beside the manifest and, by mankind, generally recognised distinction between justice and the other virtues, particularly between justice and beneficence, so ably explained by Dr

Adam Smith, as formerly noticed by the author, there may also be perused with advantage, as an authority in the law of nations, some original and profound observations, in that part of the lectures delivered by the late Dr Chalmers, as Professor of Moral Philosophy in the University of St Andrews, "On the Phenomena of Anger and Gratitude, and the moral theory which has been grounded upon them;" and on "Perfect and Imperfect Obligations," as contained in the fifth volume of his works, published during his life in 1835. For Dr Chalmers was not only a most eloquent and powerful pulpit orator, a profound theologian of enlarged views, skilled in the mathematical sciences, and in the physics of the external material world, but also a patient, acute, and discerning observer and analyst of the various branches of mental science, or the physiology of mind, both in the individual and in men congregated in societies, embracing the doctrines of what has been termed political economy. His observations on the various emotions, and of the will as influencing these emotions, are likewise well worthy of mature perusal, as connected with the doctrines of criminal law.

In the recent work, also, of Professor Whewell, Master of Trinity College, Cambridge, entitled *Elements of Morality, including Polity*, 1845, there is to be found much useful discussion and information regarding the distinction between morality or ethics, and law; their connection, and their mutual influence on each other; and on the necessity of the rules of justice and law to a certain extent, for the existence of mankind in society; as likewise generally on international law. At the same time it is humbly thought the arrangement of the work would have been more philosophical and luminous, if the author had given his great abilities more leisure, and had extended his researches a little farther. Professional lawyers, also, may perhaps be disposed to question the correctness of some of his positions.









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